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COMMENDATIONS

The following ***Assistant United States Attorneys*** have been commended:

Norman Anderson and ***Dennis Fisher*** (District of North Dakota), by Shirley D. Peterson, Assistant Attorney General, Tax Division, Department of Justice, Washington, D.C., for their outstanding success in the trial of the first tax fraud scheme in the nation involving the issuance of false Forms 1099.

Lynne H. Buck (Ohio, Northern District), by Craig E. Richardson, Associate Chief Counsel, Drug Enforcement Administration, Washington, D.C., for her special efforts and skill in obtaining the dismissal of federal defendants from a civil action.

Michael P. Carey (District of Colorado), by Howard C. Cope, Supervisory Liquidation Specialist, Federal Deposit Insurance Corporation (FDIC), Denver, for his successful trial of a case which resulted in the settlement of a long standing claim and a significant recovery for the FDIC.

Paul G. Cassell (Virginia, Eastern District), by Paul A. Adams, Inspector General, Department of Housing and Urban Development, Washington, D.C., for successfully prosecuting a case involving a real estate scheme to enable speculators to obtain government-insured loans to which they were not entitled.

Donna L. Fatsi (District of Connecticut), by Richard A. Kistner, Chief of Police, New London Police Department, for her successful prosecution of a complex drug trafficking case.

Nathan A. Fischbach (Wisconsin, Eastern District), by Commanding General J.R. Dailey, Marine Corps Research, Development, and Acquisition Command, U.S. Marine Corps, Washington, D.C., for his successful efforts in a procurement case in which a temporary restraining order and a preliminary injunction were sought to stop "the performance of a high priority contract."

Patricia J. Gorence (Wisconsin, Eastern District) was elected Secretary of the State Bar of Wisconsin, and was also named "Lawyer of the Year-Prosecutor" by the Milwaukee Bar Association following a competition among attorneys in the Milwaukee metropolitan area.

Patrick D. Hansen (Indiana, Northern District), by Woodrow W. Wilson, Jr., Resident Agent in Charge, Drug Enforcement Administration, Hammond, for his success in obtaining an indictment and conviction of a narcotics trafficking organization known as the "Balloon People," leading to the seizure of U.S. currency in excess of a quarter of a million dollars.

John M. Haried (District of Colorado), by Gary Brown, Acting Chief Park Ranger, Rocky Mountain National Park, National Park Service, Estes Park, for conducting an excellent legal update instruction course at Rocky Mountain National Park.

Bruce Hinshelwood (Florida, Middle District), by William S. Sessions, Director, FBI, Washington, D.C., for his valuable support and assistance in a complex bribery investigation.

Mark C. Jones (Michigan, Eastern District), by Williams S. Sessions, Director, FBI, Washington, D.C., for the successful outcome of his investigations into the illegal distribution of prescription drugs in the Flint area. Also, by Gregory W. Anderson, Director, Corporate and Financial Investigations, Blue Cross and Blue Shield, Detroit, for his outstanding success in prosecuting several cases involving a number of health care professionals involved in complex conspiracies designed to defraud Blue Cross and Blue Shield of Michigan.

Gerald F. Kaminski (Ohio, Southern District), by Colonel Edwin F. Hornbrook, Chief, Claims and Tort Litigation Staff, Office of The Judge Advocate General, Department of the Air Force, Washington, D.C., for his vigorous defense of a complex civil action, both at trial and on appeal before the Sixth Circuit Court of Appeals.

John H. Kyles and ***Michael E. Clark*** (Texas, Southern District), by Derle Rudd, Regional Inspector, IRS, Dallas, for their professionalism and skill in obtaining a guilty plea in a complex tax case.

Michael O. Lang (Michigan, Eastern District), by William R. Coonce, Special Agent in Charge, Drug Enforcement Administration, Detroit, for obtaining a three-count guilty verdict against a major drug trafficker.

Frank A. Libby, Jr. (District of Massachusetts), by Calvin Ninomiya, Chief Counsel, Bureau of the Public Debt, Department of the Treasury, Washington, D.C., for his excellent representation provided to the Bureau in a trustee process action. Also, by Robert M. Fenner, General Counsel, National Credit Union Administration, Washington, D.C., for his excellent advice and counsel in a potential affirmative civil case involving attorney malpractice.

Gregory G. Lockhart and ***Gary L. Spartis*** (Ohio, Southern District), by Daniel L. Schofield, Chief, Legal Instruction Unit, FBI, Washington, D.C., for their participation at the New Agents' Moot Court recently held at the FBI Academy in Quantico, Virginia.

Carlos E. Martinez and **Mark M. Dowd** (Texas, Southern District), by Carol Hallett, Commissioner of Customs, Washington, D.C., and George D. Heavey, Assistant Commissioner, Office of Internal Affairs, U.S. Customs Service, Washington, D.C., for their excellent representation in prosecuting an individual for impersonating a Customs officer and illegally removing parrots from the Department of Agriculture Quarantine Station in Mission, Texas.

James Mitchell (Michigan, Eastern District), by Daniel L. Schofield, Chief, Legal Instruction Unit, FBI, Washington, D.C., for his participation in the New Agent's Moot Court recently held in Quantico, Virginia.

Maureen Murphy and ***Lynne Buck*** (Ohio, Northern District), by William D. Branon, Special Agent in Charge, FBI, Cleveland, for their outstanding efforts in obtaining the dismissal of two FBI agents from a complex civil action brought against them.

Gerald J. Rafferty, Bernard Hobson, and ***John Haried*** (District of Colorado), by Robert L. Pence, Special Agent in Charge, FBI, Denver, for their participation and valuable contribution to a moot court training session conducted by the FBI.

Paula M. Ray (District of Colorado), by Paul M. Levin, Supervisory Attorney, Claims Division, U.S. Postal Service, Washington, D.C., for her excellent representation and legal skill in a civil action resulting in a favorable judgment on behalf of the United States.

Rich Richards (Iowa, Southern District), by Paul R. Stultz, District Counsel, Immigration and Naturalization Service, Omaha, for his successful prosecution of a complex, multiple-count immigration case involving new areas of immigration law.

Joseph K. Ruddy (Florida, Middle District), by William S. Sessions, Director, FBI, Washington, D.C., for successfully prosecuting of a number of individuals associated with the Medellin Cartel.

James S. Russell (District of Colorado), by Robert J. Zavaglia, Chief, Criminal Investigative Division, IRS, Denver, for his outstanding presentation on "Civil and Criminal Asset Forfeiture" at a recent Financial Investigative Techniques course for Western Slope law enforcement officials.

James L. Santelle (Wisconsin, Eastern District), by the Milwaukee Bar Association for his outstanding work in the past two years as Editor-in-Chief of The Milwaukee Lawyer, a Milwaukee Bar Association publication.

Whitney L. Schmidt (Florida, Middle District), by William S. Sessions, Director, FBI, Washington, D.C., for his significant accomplishments in securing the conviction and sentencing of a violent career criminal.

Jeffrey Smith (District of New Jersey), by Gerald M. Auerbach, General Counsel, U.S. Marshals Service, Arlington, Virginia, for his successful prosecution of a Bivens lawsuit against three Deputy U.S. Marshals.

Gary L. Spartis (Ohio, Southern District), by James H. DeAtley, Assistant Director, Office of Legal Education, Executive Office for United States Attorneys, Department of Justice, Washington, D.C., for his participation in the two-week Basic Criminal Trial Advocacy Course.

Robert P. Storch (Florida, Middle District), by Michael G. Noah, Senior Vice President, New York State Consumer Bank, Buffalo, New York, for his successful prosecution of an All America Mobile Home fraud case.

John Ulrich (District of South Dakota), by David Reizes, District Director, IRS, Aberdeen, for his professional management of a case leading to a guilty plea to conspiracy and submitting false statements to the IRS.

Randall E. Yontz (Ohio, Southern District), by Jerry Belenker, Attorney, Consumer Protection Division, U.S. Postal Service, Washington, D.C., for his valuable assistance in an action to maintain the status quo during administrative proceedings which resulted in a stipulated agreement on behalf of the Postal Service.

The following United States Attorneys and their staffs were commended for their support of the educational community in their districts in addressing America's drug problems and stressing the importance of influencing our youth in the true meaning of drug awareness:

EASTERN DISTRICT OF MICHIGAN

Stephen J. Markman, United States Attorney for the Eastern District of Michigan, Assistant United States Attorneys Michael Stern and Ross Parker, and ***Staff,*** were commended by Seymour Gretchko, Superintendent, West Bloomfield Schools, West Bloomfield, Michigan, for their outstanding cooperation extended to the Board of Education in tenure proceedings against a teacher involved in illicit drug activity, thus sending a message to the students, staff, and community that "drugs are a serious matter and will not be overlooked or treated indifferently."

DISTRICT OF DELAWARE

William C. Carpenter, Jr., United States Attorney for the District of Delaware, and ***Staff,*** were awarded a Distinguished Unit Citation from the Office of Public Safety, Department of Police, Wilmington, Delaware. It reads:

> The Wilmington Police Department commends the members and organizers of the "First State Force" for their personal and professional efforts in providing greatly needed drug awareness education to over 25,000 children this past school year. Your dedicated service continues to fulfill the highest values of police service--the protection of lives and public safety.

* * * * *

INSPECTOR GENERAL, DEPARTMENT OF HEALTH AND HUMAN SERVICES, PRESENTS AWARDS

Richard P. Kusserow, Inspector General, Department of Health and Human Services, Washington, D.C. (HHS) presented Office of Inspector General awards to a number of Department of Justice executives, attorneys and investigators in recognition of their outstanding efforts on behalf of the Department of Health and Human Services during 1989. HHS oversees more than three hundred programs with annual outlays in excess of $500 billion, which account for approximately one-third of all Federal Government outlays. Of paramount importance is HHS relations with the ninety-four offices of the United States Attorneys who received their cases, rendered opinions, provided ongoing guidance and direction, resulting in over 1,270 successful prosecutions during FY 1989.

The ***Inspector General's Prosecutive Leadership Award*** was presented to the following United States Attorneys:

D. Michael Crites
United States Attorney for the
Southern District of Ohio

Andrew Maloney
United States Attorney for the
Eastern District of New York

The ***Inspector General's Integrity Award*** was presented to the following United States Attorneys and Assistant United States Attorneys:

Henry K. Oncken
United States Attorney for the
Southern District of Texas

J. William Roberts
United States Attorney for the
Central District of Illinois

Robert J. Baca, District of New Mexico
Barbara Ann Bailey, District of Connecticut
Peter Ball, Eastern District of New York
Jeffrey Bornstein, N.D., California
Robert J. Brooks, District of Montana
Lynn Crooks, District of North Dakota
Byron G. Cudmore, C.D., Illinois
Donald Daniels, W.D., Michigan
James P. Fleissner, N.D., Illinois
Roy Hayes, E.D., Michigan
Matthew L. Jacobs, E.D., Wisconsin
Mark Jones, E.D., Michigan
Robyn R. Jones, S.D., Ohio
Gary P. Jordan, District of Maryland
Karl K. Lunkenheimer, E.D., Pennsylvania
Roberto Moreno, M.D., Florida
James V. Moroney, N.D., Ohio
Walter J. Postula, M.D., Florida
Jerome Roth, E.D., New York
David C. Stephens, District of South Carolina
Frederick A. Stine, V, E.D., Kentucky
Catherine L. Votaw, E.D., Pennsylvania

The ***Inspector General's Integrity Award*** was also presented to ***Ronald Clark*** and ***Frank Rothermel,*** both Trial Attorneys for the Commercial Litigation Branch of the Civil Division.

* * * * *

PERSONNEL

On July 18, 1990, ***William P. Barr*** was confirmed by the United States Senate by voice vote to be the Deputy Attorney General. Mr. Barr was formerly Assistant Attorney General for the Office of Legal Counsel.

On July 16, 1990, ***W. Lee Rawls*** became the Acting Assistant Attorney General for the Office of Legislative Affairs. Mr. Rawls was formerly with a private law firm in Washington, D.C.

On July 16, 1990, ***E. Montgomery Tucker*** became the Interim United States Attorney for the Western District of Virginia.

On July 17, 1990, ***John W. Raley*** was confirmed by the United States Senate to be the United States Attorney for the Eastern District of Oklahoma.

On July 20, 1990, ***Lourdes G. Baird*** was Presidentially appointed United States Attorney for the Central District of California.

On July 30, 1990, ***Wevley William Shea*** became the Interim United States Attorney for the District of Alaska.

On August 1, 1990, ***Kenneth W. Sukhia*** became the Interim United States Attorney for the Northern District of Florida.

* * * * *

First Inspector General For The Department Of Justice

On June 25, 1990, ***Richard J. Hankinson*** became the first Inspector General for the Department of Justice. Mr. Hankinson served for four years as Assistant Commissioner in the Office of Physical Security and Law Enforcement at the General Services Administration in Washington, D.C. and for over twenty years as a Special Agent of the U.S. Secret Service.

The Inspector General directs a nationwide staff of investigators, auditors, and inspectors in three principal areas: 1) conducting audits and investigations into fraud, waste, abuse, and employee misconduct; 2) providing leadership in the promotion of economy and efficiency and the detection and prevention of fraud and abuse in the Department's programs and operations; and 3) keeping the Attorney General and the Congress informed about deficiencies in the administration of Department programs and operations.

For information concerning Inspector General visits to United States Attorneys' Offices, please refer to the United States Attorneys' Bulletin, Vol. 38, No. 7, dated July 15, 1990, at page 158.

The Office of the Inspector General is located in Room 6649 of the Main Justice Building, l0th and Constitution Avenue, N.W., Washington, D.C. 20530. The telephone number is (FTS) 368-3435 or (202) 514-3435.

* * * * *

CRIME ISSUES

Omnibus Crime Bill Passes In The Senate

Attorney General Dick Thornburgh commended the Senate action in adopting an amended version of S. 1970, the Omnibus Crime Bill, on July 11, 1990, and stated the following:

> I am especially pleased to note that the Senate not only took steps toward restoring an enforceable death penalty for the most heinous federal crimes, such as assassination of the President, murders of American hostages, fatal mail bombings, espionage, treason and murders of federal law enforcement officers but also adopted the Administration's proposal to extend capital punishment to drug kingpins. S. 1970 also includes a large number of very important minor and technical provisions and enhanced penalties for firearms violations proposed by the Administration.
>
> I am also pleased to see that much of what the President put forward in the legislative proposal on financial institution fraud which he announced on June 22, 1990 has been integrated into the savings and loan amendment to S. 1970, along with a number of other useful proposals in a broader bipartisan savings and loan package.
>
> In particular, I am pleased to note that one of the President's primary proposals, one which would immediately allow the Department of Justice to more effectively utilize the experienced expert personnel from throughout the Executive Branch, was adopted. It will allow us to combine forces and more efficiently pursue those responsible for defrauding the American people.
>
> S. 1970 also includes the Debt Collection Reform Act, which will help assure that restitution, fines and penalties due to the government and other victims of crime are more effectively collected.
>
> Throughout the past several weeks, Bill Barr, the Deputy Attorney General designate, Special Counsel Jim Richmond, and other Department officials have worked constantly with Department of the Treasury officials and representatives of the regulatory agencies as well as to address Congressional concerns to achieve a bipartisan consensus product.

* * * * *

New Organized Crime Headquarters' Litigation Unit

On July 3, 1990, Edward S.G. Dennis, Jr., Assistant Attorney General for the Criminal Division, advised all United States Attorneys that as part of the recent U.S. Attorney-Strike Force merger, the Attorney General established a headquarters' litigation unit in the Organized Crime and Racketeering Section of the Criminal Division. The purpose of this unit is to prosecute organized crime cases in districts without strike force units, to assist strike force units when help is requested, and to otherwise undertake special projects as directed by the Organized Crime Council. The Attorney General has personally placed great emphasis on the importance of this unit in his new organized crime program.

This new litigation unit (nicknamed the "strategic reserve") will be operational shortly. Sixteen of the twenty attorney positions have been filled. At least six of those attorneys will be on board in July, and the remainder by late September. The attorneys recruited vary in experience levels--several have had over twenty years' prosecutorial experience; several are relatively new lawyers hired under the Department's honors program; but most have had substantial prior prosecutorial experience, and all have superior academic and/or professional records to date.

Many of you indicated in your recently submitted organized crime district strategic plans or threat assessments that you could effectively use assistance in conducting organized crime investigations and prosecutions in your districts. If you could use such assistance now or at any time in the future, please contact Jim Knapp, head of the litigation unit at (FTS) 368-2567 or (202) 514-2567. Until all attorneys are on board and the national strategy is in place, our top priorities for use of the headquarters' litigation unit will be La Costa Nostra matters, labor racketeering matters and Asian organized crime matters.

* * * * *

Financial Institution Fraud Update

On July 20, 1990, Attorney General Dick Thornburgh addressed the Law Enforcement Coordinating Committee (LECC) meeting of the Western District of Missouri in Kansas City. The Attorney General predicted that financial institution fraud cases would remain a priority for the Department for at least the next five years.

On July 11, 1990, James G. Richmond, Special Counsel for Financial Institutions, and United States Attorney for the Northern District of Indiana, testified before the Criminal Justice Subcommittee, Committee on the Judiciary, U.S. House of Representatives, concerning several pending financial institutions-related bills.

An update on the fight against financial institution fraud is attached at the Appendix of this Bulletin as Exhibit A.

* * * * *

ASSET FORFEITURE

Forfeiture Policies

On July 3, 1990, Cary H. Copeland, Director, Executive Office for Asset Forfeiture, issued a memorandum to all United States Attorneys, and other Department, Bureau and Agency officials, discussing the payment of state and local taxes on seized or forfeited property, purchase or personal use of forfeited property by Department of Justice employees, seized cash held for evidence, and transfer of funds from the Seized Asset Deposit Fund to the Assets Forfeiture Fund.

A copy of this memorandum is attached at the Appendix of this Bulletin as Exhibit B.

* * * * *

Departmental Policy Regarding The Seizure And Forfeiture Of Real Property That Is Potentially Contaminated, Or Is Contaminated, With Hazardous Substances

On June 29, 1990, Cary H. Copeland, Director, Executive Office for Asset Forfeiture, issued a memorandum to all United States Attorneys, and other Department, Bureau, and Agency officials concerning the seizure and forfeiture of real property that is potentially contaminated, or is contaminated, with hazardous substances. A copy is attached at the Appendix of this Bulletin as Exhibit C.

The Department issued its initial policy on June 23, 1989, which was based on the Environmental Protection Agency's (EPA) proposed implementing regulations to Section 120(h) of the Superfund Amendment and Reauthorization Act of 1986 (SARA) to the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA). (See United States Attorneys' Bulletin, Vol. 37, No. 7, dated July 15, 1989, at page 215.) However, on April 16, 1990, EPA promulgated its final regulations interpreting Section 120(h). Additionally, on May 16, 1990, the Environment and Natural Resources Division issued a memorandum providing guidance to federal agencies involved in forfeitures regarding notice and liability under the statute. In light of the significant changes contained within the final regulations and the Environment Division's guidance, the Department is now promulgating a revised policy which supersedes the initial Departmental policy and any intervening directives by Department components

If you have any questions concerning this policy, please call James Brown, Attorney, Asset Forfeiture Office of the Criminal Division at (202) 514-1263 or (FTS) 368-1263.

* * * * *

Forfeiture Income For FY 1990

On July 18, 1990, William P. Barr, Deputy Attorney General, advised all United States Attorneys and other Department of Justice officials that the President's budget for FY 1990 projects forfeiture deposits of $470 million. Through the first nine months of the year, deposits total $314 million. We must significantly increase production to reach our budget target.

Two factors suggest that we can yet realize our forfeiture goal for the year. First, we are within striking distance of the target--much closer than at this time last year. Second, the Seized Asset Deposit Fund is at an all-time high: over $348 million. We should be able to complete many of these cash cases in time to deposit the proceeds by September 30. Failure to achieve the $470 million projection would expose the Department's forfeiture program to criticism and undermine confidence in our budget projections. Every effort must be made to increase forfeiture income during the remaining three months of FY 1990.

The Attorney General and the Deputy Attorney General solicit your personal commitment to reaching our forfeiture production goal. The Executive Office for Asset Forfeiture is available to support your efforts in every way possible. Please let that office know if there are initiatives that can be undertaken to aid you in your work.

* * * * *

International Specialists Join The Asset Forfeiture Office, Criminal Division

The Asset Forfeiture Office (AFO) of the Criminal Division has hired Linda Samuel and Juan Marrero to serve as Special Counsel to the Director for International Forfeiture Matters. They will work closely with Joseph H. (Mike) Payne III, who has wide experience in both forfeiture and international law. The specialists will also coordinate other types of international forfeiture matters, such as responses to foreign government requests for assistance in recovering assets forfeitable under foreign laws, but which have been deposited or invested in the United States.

Federal prosecutors who seek to restrain and forfeit illicit assets traced abroad should contact any of the specialists at (FTS) 368-1267 or (202) 514-1267.

* * * * *

Tax Division Continues To Make Improvement In Debt Collection

Recent statistics indicate that the Tax Division has collected $41,498,000 in debts through the first eight months of fiscal year 1990. At this point last year, the Division had collected only about $12 million, on the way to a yearly total of somewhat more than $23 million.

* * * * *

DRUG ISSUES

DISTRICT OF COLORADO

On June 27, 1990, Vice President Dan Quayle and Michael J. Norton, United States Attorney for the District of Colorado, announced the distribution to state and local law enforcement agencies of $3,700,000 which had been seized in two illegal narcotics investigations. A check in the amount of $1,820,540 was presented to both the Colorado State Patrol and to the Eagle County Sheriff's Office, with the balance of the funds seized to be transferred to the Department of Justice's Asset Forfeiture Fund for use in building federal prison facilities and for other purposes.

In the first case, an officer of the Port of Entry Section of the Colorado Department of Revenue observed a tractor trailer rig with New Jersey license plates which appeared to be overweight. The driver of the truck claimed the truck was empty. The officer notified the Colorado State Patrol of his suspicions and the truck driver was followed. When the driver committed a moving violation, the truck was stopped and searched, and the officers discovered and seized $4,035,663 in U.S. currency in five large cardboard boxes concealed in the trailer and sleeper compartment of the tractor. The tractor and trailer were also seized and are being forfeited for sale at a later date. Any money realized from the sale of the tractor and trailer will be divided in the same manner as the forfeited cash. An investigation into the circumstances surrounding the transportation of the large amount of cash continues.

The second case arose when DEA agents, working undercover in McAllen, Texas, gained access to an organization which was "laundering" profits from the sale of marijuana and other illegal drugs. In February, 1988, the drug dealers met with the DEA undercover agents in Texas

and agreed to purchase 24 bales of marijuana weighing approximately 500 pounds from the DEA agents who were to bring the marijuana to Denver to consummate the purchase. Unbeknownst to the drug dealers, the marijuana was contraband provided by the Texas Department of Public Safety for the undercover operation. Three days later, the drug dealers and the DEA agents met in Golden, Colorado. The drug dealers confirmed they were there to purchase marijuana and produced $184,790 in cash which they intended to use to pay for the marijuana. The drug dealers were arrested and the currency was seized. In May, 1988, five of the drug dealers pleaded guilty to conspiracy to possess with intent to distribute marijuana and were later sentenced to terms of imprisonment ranging from five to six years.

* * * * *

Status Of Cocaine And Heroin

On July 17, 1990, the Senate Judiciary Committee held a hearing on the status of cocaine and heroin. Ronald Caffrey, Deputy Assistant Administrator for Operations, Drug Enforcement Administration, described several positive recent developments, including the decrease in the coca leaf price (which discourages growers), the decrease in cocaine purity in the United States, and the rise in the retail price.

On July 19, Mr. Caffrey testified before the House Select Narcotics Committee on the heroin situation. He reported that, unlike the cocaine situation, the heroin situation is worsening and there is an increase in worldwide production and an increase in heroin purity on the street.

* * * * *

POINTS TO REMEMBER

Charging Multiple §924(c)(1) Counts

Lawrence Lippe, Chief, General Litigation and Legal Advice Section, Criminal Division, has prepared a statement entitled "Charging Multiple §924(c)(1) Counts," which is attached at the Appendix of this Bulletin as Exhibit D.

If you have any questions, please call Mr. Lippe at (FTS) 368-1027 or (202) 514-1027.

* * * * *

Freedom Of Information Act/Privacy Act Issue

A case decided in 1989 by the U.S. Supreme Court has significant implications for the Executive Office for United States Attorneys and the United States Attorneys' Offices whose computerized lists of civil and criminal cases become the subject of Freedom of Information Act (FOIA) requests. In Department of Justice v. Reporters Committee for Freedom of the Press, 109 S.Ct. 1468, 1483-85, 103 L.Ed.2d 774 (1989), the Court established, under the FOIA's Exemption (7)(C), that agencies may engage in categorical balancing of public versus private interests in agency records in favor of nondisclosure, especially where substantial privacy interests can exist.

The record at issue in Reporters Committee was the FBI "rap sheet" (arrest record) of an individual whose business had ties to organized crime. The Court considered a private citizen's criminal history contained in "rap sheets," to be a "strong privacy interest...[which justified nondisclosure] even where the information may have been at one time public." Id., at 1478. It further found that computerized summaries of hard-to-obtain information is practically obscure from the public. Id., at 1477.

Based on Reporters Committee, the Justice Department's Office of Information and Privacy (the office charged with advising all federal agencies on FOIA matters) has specifically extended privacy protection to the names of individuals appearing in case names on computerized lists (e.g., U.S. v. Johnny B. Goode), as well as to case identifiers (e.g., 85-Cr-777), even though this information is available in individual district court offices as a matter of public record. It is the compilation of this otherwise "practically obscure" public information that imbues the computerized names and case identifiers with the necessary privacy interest to justify its withholding. In other words, the case names and numbers must now be excised from computerized lists of civil and criminal cases, leaving only the statistical data, before such lists are released to FOIA requesters.

If a United States Attorney's Office receives a request for computerized data on criminal and/or civil cases directly, the request should be considered a FOIA request and referred to Bonnie L. Gay, Attorney-in-Charge, Freedom of Information Act/Privacy Act Unit, Room 6410, Patrick Henry Building, 601 D Street, N.W., Washington, D.C. 20530, (FTS) 241-7826 or (202) 501-7826. If the request is from a Member of Congress, the Congressman or Senator should be referred to Manuel A. Rodriguez, Legal Counsel, Executive Office for United States Attorneys, Room 1629, Department of Justice, 10th and Constitution Avenue, N.W., Washington, D.C. 20530, (FTS) 368-4024 or (202) 514-4024.

* * * * *

Civil Forfeiture Issues And The Right To Financial Privacy

On June 19 and 20, 1990, Stefan Cassella, Trial Attorney, Money Laundering Office of the Criminal Division, addressed the California Bankers Association Program on Money Laundering in Los Angeles and San Francisco on the subject of civil forfeiture issues and the right to financial privacy. Attached at the Appendix of this Bulletin as Exhibit E is an outline of Mr. Cassella's remarks.

If you have any questions or would like to discuss any of the issues contained in this outline, Mr. Cassella may be reached at (FTS) 368-1758 or (202) 514-1758.

* * * * *

Civil Division Attorneys With Expertise In Designated Areas

To assist the United States Attorneys' Offices in the performance of their day-to-day activities, attached at the Appendix of this Bulletin is an updated list of Civil Division attorneys with expertise in designated areas.

* * * * *

SENTENCING REFORM

Guidelines Sentencing Update

A copy of the Guideline Sentencing Update, Volume 3, No. 9, dated July 6, 1990, is attached as Exhibit F at the Appendix of this Bulletin.

* * * * *

Federal Sentencing Guide

Attached at the Appendix of this Bulletin as Exhibit G is a copy of the Federal Sentencing Guide, Volume 1, No. 11, dated June 19, 1990, and Volume 2, No. 1, dated July 2, 1990, which is published and copyrighted by Del Mar Legal Publications, Inc., Del Mar, California.

* * * * *

LEGISLATION

Americans With Disabilities Act

On July 13, 1990, Attorney General Dick Thornburgh commended Congress for their passage of the Americans with Disabilities Act. The Department of Justice is committed to working with the President and other Executive Branch agencies to ensure that this new legal mandate is effectively implemented and enforced.

* * * * *

Powers Of The Inspectors General

On July 18, 1990, Jack Keeney and John McGinnis, Deputy Assistant Attorneys General for the Criminal Division, appeared before the Senate Committee on Governmental Affairs concerning the extension of criminal law enforcement authority to Inspectors General and the deputation procedures for Inspectors General. Mr. Keeney explained the Department's opposition to the statutory extension of this authority and testimonial subpoena power to Inspectors General. He outlined the revised procedures for responding to Inspector General requests for deputation which we believe are preferable to any statutory expansions of their authority.

Also on July 18, 1990, the Energy and Commerce Committee, Subcommittee on Oversight and Investigations, conducted a hearing on the generic drug industry. This hearing pertained in large part to the rescission of Secretary of Health and Human Services' delegation of authority to the Inspector General of HHS. The Secretary's testimony and the Chairman's response suggest that the Subcommittee could hold a hearing on the rescission and the Justice Department's subsequent enforcement activities in lieu of the Inspector General authority.

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Civil Justice Bill

On July 12, 1990, the Senate Judiciary Committee passed, 12 to 1, an amended version of S. 2648, a bill to streamline federal litigation and to authorize sixty-six new federal judgeships. The Department of Justice will work with the Committee to produce a bill on the floor or in conference that we can fully support. A views letter detailed several points where we feel modification is needed.

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Racial Justice Act

The House Judiciary Subcommittee on Civil and Constitutional Rights marked up H.R. 4618, the Racial Justice Act of 1990, which would effectively deny states and the federal government use of the death penalty, as the Act would impose an unrealistic burden of proof on the prosecution to respond to statistical disparities in the race of those currently on death row. The bill passed by a vote of 5-3.

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CASE NOTES

CIVIL DIVISION

Supreme Court Reaffirms That The Federal Government Cannot Be Equitably Estopped From Enforcing The Law.

A retired Navy annuitant was given oral and written misinformation concerning the maximum amount of earned income he could make and still receive his government annuity. The district court found that the government could not be estopped in these circumstances, but the Federal Circuit viewed the case as involving "affirmative misconduct" and reversed. Now the Supreme Court, in one of the strongest decisions on this subject that it has rendered, has reversed.

The majority opinion appears to hold that a plaintiff seeking payment of money from the public treasury, in violation of the terms authorized by statute, can never assert equitable estoppel against the United States. This is because the Appropriations Clause of the Constitution mandates that no money be drawn from the Treasury "but in Consequence of Appropriations made by Law." Given the force of the Appropriations Clause, and the Court's precedents, the majority rejected "the [dissent's] suggestion * * * that the terms of a statute should be ignored based on the facts of individual cases." As to the other categories of equitable estoppel cases, the Court (a) declined to decide whether "there are any extreme circumstances" that might warrant an estoppel in cases "not involving payments from the Treasury"; (b) reaffirmed its precedents; and (c) warned the lower courts against reading language in prior decisions concerning whether "affirmative misconduct" may estop the government as "an invitation to search for an appropriate case in which to apply estoppel against the Government."

OPM v. Richmond, No. 88-1943 (June 11, 1990). DJ # 154-F88-316.

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Supreme Court Holds That A District Court Order Which Rejects The Secretary Of Health And Human Services' Disability Standards And Remands The Case To The Secretary For Further Proceedings Is An Appealable Order

The Secretary of Health and Human Services, applying the agency's disability regulations, denied plaintiff's application for Social Security widow's disability benefits. Plaintiff appealed the administrative ruling to the district court. The district court held that the Secretary's disability determination under the regulatory listings was not sufficient, and ordered the Secretary on remand to apply a functional standard and to make findings as to whether the claimants' functional impairments made her unable to perform any gainful employment. The Third Circuit dismissed our appeal of the remand order, holding that remands are collateral, non-appealable orders.

The Supreme Court has now reversed and remanded the case. The Court held that an order rejecting the Secretary's standards and remanding the case is an appealable "final judgment" under §405(g) of the Social Security Act. The Court said this reading of the statute made sense if on remand the Secretary awards benefits (under the court-ordered standard) there would be grave doubt whether he could appeal his own order. The Court distinguished other types of remands for additional evidence which are not appealable under §405(g). The Court also distinguished last term's Hudson decision, where the Court stated that a remand to the Secretary is part and parcel of the civil action, as being a construction of the Equal Access to Justice Act. The Court did not reach the broader question of whether all substantive remands to administrative agencies are immediately appealable.

Sullivan v. Finkelstein, No. 89-504 (June 18, 1990). DJ # 137-48-888

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Supreme Court Holds That A Second "Substantial Justification" Finding Is Not Required Before The Government May Be Held Liable Under The Equal Access To Justice Act For Fees For Fee Litigation

The district court awarded $1.2 million in attorney's fees and expenses under the Equal Access to Justice Act (EAJA). The Eleventh Circuit affirmed in part and reversed and remanded the case for a recalculation of the award. It held, among other things, that the district court could award attorney's fees and expenses under EAJA for the fee litigation without a separate inquiry as to whether the government's position in that portion of the litigation was substantially justified.

The Supreme Court, in an opinion by Justice Stevens, has affirmed. The Court held that the language of the Act, which refers to "the position" of the government, suggests that only one "substantial justification" inquiry--rather than a separate inquiry at each phase of the litigation--was required. It also rejected our argument that the single inquiry rule would lead to exorbitant fee awards, noting that district courts would be able to recognize and discount such requests. Finally, the Court found that the "separate inquiry" rule we espoused would multiply litigation and would deter litigants from bringing suit. However, in footnote 10 of the opinion, the Court observed that "fees for fee litigation should be excluded to the extent that the applicant ultimately fails to prevail in such litigation." Under the automatic fees for fees rule adopted by the Eleventh, Second and First Circuits, the government would have been liable for all fees for the fee litigation whether or not our objections to the fee award proved successful.

Commissioner, Immigration & Naturalization Service v. Jean, No. 89-601 (June 4, 1990). DJ # 39-18-495.

Attorney: Mary K. Doyle - (202) 514-3377 or (FTS) 368-3377

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Supreme Court Upholds Constitutionality of Equal Access Act And Affirms Ruling That Public High School Unlawfully Discriminated Against Student Religious Club

Plaintiffs are past and present students at Westside High School, a public secondary school that permits its students to join, on a voluntary basis, student groups and clubs which meet after school on the school premises. Citing the Establishment Clause and a school policy requiring all student clubs to have faculty sponsorship, Westside refused to allow plaintiffs to form a "Christian Club" that would have the same privileges as other student clubs, except it would not have a faculty sponsor. The plaintiffs thereafter brought this suit, alleging that Westside's action violated the Equal Access Act and the Free Speech Clause, among other things. The District Court ruled against plaintiffs and the Eighth Circuit reversed, holding that the Equal Access Act forbids discrimination against plaintiffs' proposed student club based on the religious content of its speech, and that the Act is constitutional.

The Supreme Court has now affirmed, holding that the Equal Access Act forbids content-based discrimination against student groups in public secondary schools if a school allows one or more "noncurriculum-related" groups to meet during "noninstructional" time. The Court held that "noncurriculum-related" student groups under the Act include any group that "does not directly relate to the body of courses offered by the school." The Court further explained that a student group "directly relates" to a school's curriculum "if the subject matter of the group is actually taught, or will soon be taught, in a regularly offered course; if the subject matter of the group concerns the body of courses as a whole; if participation in the group is required for a particular course; or if participation in the group results in academic credit." Applying these statutory terms to the facts, the Court held that the Equal Access Act applied to plaintiffs' Christian Club and that the Act does not violate the Establishment Clause for the reasons stated in Widmar v. Vincent, 454 U.S. 263 (1981), where the Court upheld equal access for university students.

Board of Education of the Westside Community Schools (Dist. 66) v. Mergens, No. 88-1597 (June 4, 1990). DJ # 145-16-2743

Attorney: Lowell Sturgill - (202) 514-3427 or (FTS) 368-3427

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Supreme Court Holds That Social Security Title II Child's Insurance Benefits Are Not "Child Support" Under AFDC's $50 Disregard

In determining whether a family's income disqualifies it from receiving Aid to Families with Dependent Children (AFDC) benefits, the states are required to "disregard the first $50 of any child support payments" received in any month for which benefits are sought. Under this provision, HHS declined to "disregard" the first $50 of Social Security Title II "child's insurance benefits," reasoning that such benefits are not "child support" because the use of that term throughout the AFDC legislation refers only to payments from absent parents.

Both the district court and the Fourth Circuit rejected this interpretation. The court of appeals reasoned that recipients of Title II benefits face the same eligibility constraints as do those directly receiving payments from absent parents and that accordingly, there was no rational basis for making a distinction, and that the Secretary's construction would raise constitutional equal protection concerns. The Supreme Court has now reversed 5-4. The Court reasoned that although "child's insurance benefits" might be considered as "support" in the generic sense, the clear and unambiguous language of the statute shows that Congress used "child support" throughout the AFDC legislation as a term of art relating solely to payments from absent parents. The Court held that the statutory distinction was justified by Congress' intent to encourage the making of child support payments by absent parents and therefore did not deny equal protection.

Sullivan v. Stroop, No. 89-535 (June 14, 1990). DJ # 145-16-2940.

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Supreme Court Upholds Constitutionality Of Act Providing That Federal Government May Order Members Of The National Guard Of The United States To Active Federal Duty Outside The United States For Training Purposes Without Gubernatorial Consent

Federal statutes provide that National Guard units can be ordered to federal active duty for training abroad for up to 15 days per year. Until 1986, state governors were given the power to veto such training missions. After several governors either exercised this veto or threatened to do so based upon their opposition to the Administration's policy in Central America, Congress enacted the Montgomery Amendment, 10 U.S.C. 672(f), which prohibits governors from withholding their consent based upon objections to the location or purpose of the training. Governor Perpich of Minnesota challenged the constitutionality of the Montgomery Amendment on the grounds that the Amendment violates the Militia Clause, which expressly reserves to the states the authority to train the militia. The Eighth Circuit, in a split en banc decision, accepted our argument that the Montgomery Amendment is a valid exercise of Congress' power under the Army Clause. Governor Perpich sought certiorari.

The Supreme Court has now unanimously affirmed. The Court held Congress' plenary power to raise armies under the Army Clause was "not qualified or restricted by the provisions of the Militia Clause." This is so, stated the Court, because the Militia Clause is a distinct source of congressional power that "may in appropriate cases supplement [Congress'] broader power to raise armies and provide for the common defense and general welfare, but it does not limit those powers." The opinion (1) forcefully affirms the expansive scope of Congress' power under the Army Clause; (2) prevents state governors from interfering, for political purposes, with Executive decisions regarding the training of federal reserve forces; and (3) validates the dual-enlistment system, whereby the Army and Air Force rely heavily on National Guard units as federal reserve components of the Total Force structure.

Perpich v. Department of Defense, No. 89-542 (June 11, 1990).
DJ # 145-15-1751

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Supreme Court Holds That Medicaid Act Creates Rights To Reasonable And Adequate Reimbursement For Participating Hospitals Enforceable Through Actions In Federal Court Under §1983

An association of Virginia hospitals brought this action against the State pursuant to 42 U.S.C. 1983, claiming that rates of reimbursement provided for in Virginia's Medicaid plan were not "reasonable and adequate" as allegedly required by the Boren Amendment to the Medicaid Act. The Boren Amendment shifted responsibility for establishing Medicaid reimbursement rates from the federal government to the States, requiring them to establish rates which "the State finds, and makes assurances satisfactory to the Secretary [of HHS], are reasonable and adequate" to meet the costs of efficiently operated facilities and to assure reasonable access to medical services for Medicaid-eligible patients.

In a 5-4 decision, the Court concluded that this language was sufficiently mandatory and specific to create enforceable rights to "reasonable and adequate" rates for Medicaid providers and that nothing in the language or structure of the statute indicated that Congress meant to foreclose enforcement under §1983. The Court specifically rejected our argument as amicus that no enforceable rights are created by the statutory requirement that the State provide "assurances" to the Secretary that its rates comply with the statute, pointing out that these assurances must rest on the State's findings that its reimbursement rates are reasonable and adequate.

Wilder v. Virginia Hospital Ass'n., No. 88-2043 (June 14, 1990).
DJ # 145-0-3077.

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D.C. Circuit Holds That Victims Of Discrimination Do Not Have A Right Of Action To Seek Judicial Supervision Of Executive Branch Enforcement Of The Civil Rights Act

Title VI prohibits educational institutions that receive federal funds from discriminating on the basis of race. Plaintiffs may sue discriminating institutions to force them to comply with the Civil Rights Act, as long as the institutions continue to accept federal funds. In addition, the Department of Education must terminate funding to a discriminating institution that refuses to comply with Civil Rights Act provisions. In this case, which began in 1970, victims of discrimination--rather than bringing suit directly against the discriminating institutions--filed a complaint (1) alleging that the Department of Education (then HEW) was refusing to enforce Title VI in seventeen southern and border states and (2) seeking judicial supervision of administrative enforcement. The district court thereafter entered an injunction compelling administrative enforcement by HEW within given time-frames. Subsequently, the suit expanded to include supervision of the enforcement of Title IX, Section 504 of the Rehabilitation Act, and E.O. 11246, at every school in the nation receiving federal funds. In 1977 the government entered into a consent decree prescribing the shape of administrative enforcement policy, including time-frames within which new complaints must be processed.

In 1988, the district court dismissed plaintiffs' complaint for lack of standing, relying upon Allen v. Wright, 468 U.S. 737 (1984). On appeal, the court of appeals reversed; however, the panel ordered further briefing on other issues. The court has now held that victims of discrimination do not have a cause of action under the Administrative Procedure Act, because they have an adequate remedy against the discriminating institutions. In addition, the panel held that the Civil Rights Act did not, by implication, create a right of action, at least when, as here, the relief sought is not "situation specific," but seeks oversight of the manner in which the government exercises its enforcement responsibilities.

WEAL v. Cavazos, No. 88-5065 (June 26, 1990). DJ # 145-16-743

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D.C. Circuit Upholds Constitutionality Of Base Closure Act And Holds That The Department Of Defense's Selection Of Military Bases For Closure Is Committed To Agency Discretion By Law

The Base Closure and Realignment Act of 1988 authorizes the Department of Defense (DOD) to close domestic military bases identified as obsolete by an independent commission. A labor union and a private contractor brought suit to enjoin the implementation of the Act, arguing that: (1) the Act violates the nondelegation doctrine; (2) the Act violates the separation-of-powers doctrine; and (3) DOD's selection of bases for closure was arbitrary and capricious under the Administrative Procedure Act (APA). The district court rejected the constitutional claims on the merits and held that the plaintiffs lacked "zone of interests" standing to pursue the APA claim.

On appeal, the D.C. Circuit has now affirmed. The Court of Appeals agreed that the constitutional claims are without merit. The Act contained standards and therefore satisfied the delegation doctrine; the Act's reserving to Congress the authority to veto the base closings through a joint resolution did not violate separation of powers, since a joint resolution must be approved by the President. With respect to the APA claim, the Court of Appeals declined to reach the standing question, adopting instead our alternative argument that the selection of bases for closure is "committed to agency discretion by law" and therefore unreviewable under 5 U.S.C. 701(a)(2). Although the Act contains specific criteria governing the selection of bases for closure, the court held that the criteria call for judgments of military policy that are not suited for judicial second-guessing.

National Federation of Federal Employees v. United States, No. 90-5004 (June 5, 1990). DJ # 35-16-3147

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First Circuit Affirms Dismissal Of Serviceman's Federal Tort Claims Act (FTCA) Claim Under Feres Doctrine

A serviceman's estate sued the United States under the Federal Tort Claims Act for wrongful death. Plaintiff alleged that the Navy's negligent failure to enroll the serviceman in an alcohol treatment program and to post adequate patrols at a Navy pier caused him to fall and drown as he was returning to his ship after drinking in town. The district court dismissed under the Feres doctrine because the death arose out of activity "incident to military service." The First Circuit affirmed the dismissal in an opinion that may prove useful in other Feres cases.

Morey v. United States, No. 89-2186 (May 29, 1990). DJ # 157-36-4389.

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First Circuit Holds That Doctrine Of Administrative Res Judicata Does Not Apply To Preclude Postal Service From Raising Failure To Mitigate In Defense To An EEO Back Pay Enforcement Action

Plaintiff, who was discharged from his job as a part-time postal clerk on the basis of medical unsuitability, ultimately succeeded in obtaining an administrative reversal of his termination on the grounds of handicap discrimination. The Equal Employment Opportunity Commission (EEOC) ordered him reinstated with back pay, but at no time during the administrative proceedings was the amount of back pay addressed. The Postal Service reinstated plaintiff and asked him to document his interim earnings and efforts to obtain employment for purposes of the back pay determination. After several rounds of submissions, the Postal Service determined that plaintiff's documentation was insufficient, and it denied back pay for failure to mitigate.

Plaintiff brought an action in district court, demanding full back pay on the basis that the Postal Service was barred by administrative res judicata from raising failure to mitigate because it did not raise the issue in the proceedings before the EEOC to determine liability. The district court granted summary judgment for plaintiff. The First Circuit has now vacated and remanded, adopting in full our arguments that administrative res judicata does not apply here because EEOC liability proceedings do not normally determine the precise amount of back pay due (nor did the proceedings here in fact do so), and because a holding of res judicata would be against public policy since mitigation is a statutory requirement. This ruling will be very helpful to the Postal Service in its efforts in several other pending EEO enforcement actions asserting the res judicata argument to obtain an unmitigated back pay award. The holding also affirms the reasonableness of the EEOC's procedures for determining liability and back pay in separate stages.

Sabat Ouinones Candelario v. Postmaster General, No. 89-1852 (June 26, 1990) DJ # 35-65-103

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Third Circuit Reverses District Court's Determination That, In His Disability Programs, The Secretary Of Health And Human Services Had Engaged In A Policy Of Nonacquiescence In Third Circuit Law On Alcoholism

In this class action, the district court determined that the Secretary "consciously" followed a policy of "nonacquiescence" with respect to Circuit case law pertaining to alcoholism and, as a remedy, issued an order establishing its own alcoholism standard and a complex set of requirements and deadlines for the readjudication of the claims of class members. The district court also extended the class to include individuals whose claims had lapsed before the instant complaint was filed.

The court of appeals has now reversed the district court's holding that the Secretary's alcoholism regulation violated Third Circuit law and was thus part of a policy of willful nonacquiescence. The court ruled that the Secretary's interpretation of his own fairly complex regulation was entitled to deference, was a reasonable interpretation, and was consistent with Third Circuit law. The court also rejected the district court's factual determination that nonacquiescence was revealed in the nineteen district court decisions and fifteen administrative decisions in which the district court found agency adjudicators to have applied the alcoholism standard in an erroneous manner. The court of appeals summarized each case (as we had in our briefing) and determined as a factual matter that the agency adjudicators did not apply an erroneous alcoholism standard. In addition, the court accepted our argument that, even if the decisions had revealed a greater number of errors, this survey of cases was statistically inadequate to prove nonacquiescence as a matter of fact since not every district court case is reported in the bound volumes or on the electronic services and since the overwhelming percentage of administrative decisions were simply not part of the record. In this connection, the court ruled that it was the plaintiffs' burden to produce an adequate sampling of decisions and to prove an "unacceptable rate of error" in alcoholism cases. Finally, the court determined that the deposition testimony of Social Security Administration officials--which the district court had determined to be inconsistent with Third Circuit law--was consistent with Third Circuit law. As a result of this ruling, the court of appeals had no reason to reach the Secretary's challenges to the remedial order.

Wilkerson v. Sullivan, Nos. 89-1786, 1852, 1856, and 1913 (May 31, 1990). DJ # 137-62-932

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En Banc Fourth Circuit Affirms Dismissal Of Federal Tort Claims Act Medical Malpractice Suit On Statute of Limitations Grounds, Adopting Broad Interpretation Of Due Diligence Requirement

Plaintiff sued under the Federal Tort Claims Act (FTCA), alleging that two doctors employed by the Public Health Service committed medical malpractice by negligently failing to diagnose Rocky Mountain spotted fever in her husband, causing his death. The doctors treated Mr. Gould while they were working in a Maryland county medical facility under a federal program designed to provide health care providers in health manpower shortage areas. The District Court dismissed the complaint because Ms. Gould did not file her administrative claim within the FTCA's two-year statute of limitations. After a panel of the Fourth Circuit reversed, the full Court granted our petition for rehearing en banc and affirmed.

Adopting a very broad interpretation of the Supreme Court's decision in United States v. Kubrick, the en banc Court held that an FTCA cause of action for medical malpractice accrues as soon as the facts "alert a reasonable person that there may have been negligence in a patient's treatment." The Court rejected Gould's argument that knowledge of the legal identity of the tortfeasor is necessary for the statute to begin running. Here, plaintiff knew who the doctors were, but did not bother to ask who employed the doctors until after the statute had run.

Gould v. U.S. Department of Health and Human Services, No. 88-3091 (June 8, 1990). DJ # 157-35-1104

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Fifth Circuit Reverses District Court Decision Granting Medicare Provider Retroactive Benefit Of HHS Cost Limit Regulation

The provider sought exemption from the cost limits as a "new provider" of Medicare services. Under the regulations in effect for the time of the exemption claim, the agency denied the exemption for the year in question. The provider brought suit, and the district court reversed the agency on the ground that a subsequent regulatory change should have been applied retroactively to the provider's benefit. The Fifth Circuit reversed. It held that the agency had explicitly made the subsequent regulation non-retroactive, that the Supreme Court's decision in Bowen v. Georgetown Univ. Hosp., 488 U.S. 204 (1988) in any event precluded the possibility of retroactive application of cost limit rules, and that the agency had correctly denied the exemption under the earlier rule. The Court explicitly reinforced the principle of Georgetown Univ. Hosp. that the statutory provision concerning "retroactive corrective adjustments" permits HHS to adjust amounts of reimbursement due pursuant to existing cost methods, but does not permit retroactive change in the methods themselves.

Sierra Medical Center v. HHS, No. 89-1806 (June 5, 1990). DJ # 137-76-423

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Eighth Circuit Affirms Dismissal, Under Feres Doctrine, Of Federal Tort Claims Act (FTCA) Suit Brought By A Civilian Who Alleged Military Doctors Negligently Failed To Diagnose Cancer During A Pre-Induction Physical Examination

Plaintiff brought an FTCA suit against the United States, alleging that military doctors negligently failed to diagnose cancer in a pre-induction physical examination. Plaintiff was sworn into the Air Force after his examination, but the Air Force discharged him because of his condition before he ever reported for active duty. Thus, he is not eligible for free military medical care or Veterans Administration care and benefits. The District Court dismissed the action on Feres grounds.

The Eighth Circuit has now affirmed in a very broad opinion, holding that "pre-induction physicals are activities incident to service" and that allowing suits of this type to proceed would disrupt the "distinctively federal" relationship between individuals such as Bowers and the military, and would have a direct effect on "the allocation of military resources."

Bowers v. United States, No. 89-1655 (June 1, 1990). DJ # 157-37-1401

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In Reverse-FOIA Action, Ninth Circuit Affirms District Court Order Granting Summary Judgment In Favor Of The State Department And Holds That De Novo Review Is Not Required In Reverse-FOIA Action

Plaintiff, a contractor that won the bid to provide maintenance and operations services at the American Embassy in Moscow, brought this reverse-FOIA action challenging the State Department's decision to disclose the hourly wage rates in the contract in response to a FOIA request. The agency concluded that the disputed information was not confidential commercial information within FOIA exemption 4 because it was an aggregate figure and releasing it would not allow persons to derive competitively sensitive information that forms a component of the aggregate figure. Plaintiff then brought this action challenging that decision. Although we prevailed below on our motion for summary judgment, the district court enjoined the agency from releasing the information pending this appeal.

The Ninth Circuit has now affirmed. The court rejected plaintiff's argument that the district court had a duty to conduct a de novo review of the agency's decision because its fact-finding procedures were inadequate. In that holding, the court joined two other circuits that have held that a district court ordinarily need not conduct a de novo review in a reverse-FOIA action. On the merits, the court held that the agency's reasoning by which it determined that the information at issue was not confidential commercial information was neither arbitrary nor capricious or an abuse of discretion.

Pacific Architects and Engineers Inc. v. Department of State,
No. 89-55010 (June 26, 1990). DJ # 145-2-522

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Ninth Circuit Holds That The Department Of Veterans Affairs (VA) May Not Seek Indemnification From Veterans Following Non-judicial Foreclosure On VA-Guaranteed Home Loans

The Department of Veterans Affairs (VA) guarantees home loans by private lenders to eligible veterans. In the event of default and foreclosure, the VA is obliged to reimburse the lender for any loss following sale of the property up to the amount of the guaranty. The VA controls the actions of the lender during any foreclosure proceedings, which are conducted pursuant to state law. Following foreclosure, the VA in some instances seeks indemnification from the defaulting veteran. Under Washington law, a lender may seek deficiency following foreclosure only after instituting judicial foreclosure proceedings. However, the VA sought indemnification even after instructing lenders to pursue nonjudicial foreclosure.

A class of veterans filed this suit to enjoin the VA from seeking indemnification after nonjudicial foreclosure. The district court held that the governing statute and regulations do not create an independent right to indemnification and that the VA's rights were no greater than that of the lender. Accordingly, when the right of the lender had been extinguished by state law, the VA retained no right against the veteran. The court of appeals has now affirmed on different grounds. The panel held that the statute and regulations create a right to indemnification. It noted, however, that Washington law permits a suit for indemnification where the lender has pursued judicial foreclosure. Thus, the VA could preserve its right to indemnification by instructing the lender to foreclosure judicially. Because Washington law does not extinguish the right to indemnification, no conflict exists between state and federal law.

Whitehead v. Derwinski, No. 89-35069 (June 4, 1990). DJ # 151-82-474

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CIVIL RIGHTS DIVISION

Supreme Court Applies Intermediate Scrutiny To Uphold Congressionally-Managed Minority Preference Programs With Non-Remedial Purpose

On June 27, 1990, the Supreme Court issued its opinion in Metro Broadcasting, Inc. v. FCC, No. 89-453, and Astroline Communications Co. v. Shurberg Broadcasting, No. 89-700, two cases out of the D.C. Circuit involving challenges under the equal protection component of the Fifth Amendment to FCC minority preference programs for radio and television licensing. In Metro Broadcasting, the Court affirmed the appellate decision upholding a program awarding a qualitative enhancement for minority ownership in comparative license hearings. In Shurberg, the Court reversed the appellate decision striking down a program allowing a licensee facing a revocation or nonrenewal hearing to transfer its license to a qualified minority business at a "distress sale" price.

In an opinion by Justice Brennan (joined by Justices White, Marshall, Blackmun and Stevens), the Court held that (l) benign race-conscious measures mandated by Congress are constitutionally permissible, even if they are not "remedial" in the sense of being designed to compensate victims of past governmental or societal discrimination, to the extent that such measures serve important governmental objectives within the power of Congress and are substantially related to the achievement of those objectives; and (2) the FCC's minority ownership policies pass muster under this test because they serve the important governmental interest of broadcast diversity and are substantially related to achievement of that objective. The Court gave great deference to the expertise of Congress and the Commission in finding a nexus between minority ownership and programming diversity, rejecting the argument that that link rests on impermissible stereotyping.

Metro Broadcasting, Inc. v. FCC, No. 89-453; Astroline Communications Co. v. Shurberg Broadcasting, No. 89-700 (June 27, 1990). DJ # 170-20-44

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ENVIRONMENT AND NATURAL RESOURCES DIVISION

Supreme Court Dismisses National Wildlife Federation Challenge To The Department Of Interior's Land Status Actions Covering 180 Million Acres For Lack of Standing

In a 5-4 decision, the Supreme Court reversed the D.C. Circuit and remanded for dismissal on standing grounds the National Wildlife Federation's massive challenge to the Department of Interior's "Land Withdrawal Review Program." Under the "Program," Interior undertook to review individual land classifications and withdrawals affecting some 180 million acres of public land with an eye to clearing title to lands now outside federal ownership and returning as much public land as possible to multiple use management, as directed by the Federal Land Management Policy Act (FLMPA).

The Court held that the plaintiff had failed at summary judgment to demonstrate its standing. As an initial matter, the Court agreed with the district court that plaintiff's primary standing affidavit "contains averments which state only that one of respondent's members uses unspecified portions of an immense tract of territory, on some portions of which mining activity has occurred or probably will occur by virtue of the governmental action." Slip Op. at 15. The Court specifically rejected the D.C. Circuit's effort to "presume" the missing connection between the affiant and the affected land. More importantly for future cases, the Court held that the Administrative Procedure Act (APA) does not provide a cause of action to challenge a government "program" like this one at all, because the program is not "agency action" within the meaning of APA §702, much less "final agency action" within the meaning of APA §704. Slip Op. at 17. For this reason, even the supplementary affidavits submitted by the Federation to cure the defect in their original affidavits could not give the Federation standing, because the APA only allows challenges to "agency action."

Finally, the Court rejected the Federation's claim to "informational standing" in its own right, for the same general reason that it rejected the supplementary affidavits. Because the Federation's affidavit did not "identify any particular 'agency action' that was the source of [its] injuries" (Slip Op. at 25), but instead alleged injury from the program as a whole, the Federation had failed to set forth specific facts necessary to survive a Rule 56 motion. The Court neither endorsed nor criticized the "informational standing" doctrine.

Justice Blackmun, writing for Justices Brennan, Marshall, and Stevens, dissented.

Lujan v. National Wildlife Federation, S.Ct. 89-640 (June 27, 1990)
(Scalia, for Rehnquist, White, O'Connor, Kennedy) DJ # 90-1-4-2910

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Bureau of Reclamation's Rates In Columbia Basin Project Sustained

Flint and others used artificially stored groundwater which had become available through the operations of the Columbia Basin Project, a federal reclamation project. The State of Washington held a water rights adjudication and determined that the groundwater belonged to the United States and that the water could be withdrawn for use only by contracting with the federal Bureau of Reclamation. The water users then entered into license agreements with the United States, but brought an action in the district court challenging the rates charged by the Bureau for use of the water. The district court, however, entered summary judgment in favor of the Bureau and the water users appealed.

The court of appeals affirmed. First, the court found that Section 9(e) of the Reclamation Project Act of 1939, 43 U.S.C. 485h(e), rather than state law, established and controlled the Bureau's authority to set the rates which could be assessed for the use of the groundwater at issue. Next, the court ruled that Section 9(e) provided no meaningful standard for determining the maximum price which may be charged by the Secretary for operations and maintenance costs under contracts entered under that provision, and accordingly, there was no law to apply. Hence, judicial review of the operation and maintenance costs being assessed to the plaintiffs was not subject to judicial review. The court also rejected the water users' contention that the Bureau's action in charging them for the use of the groundwater constituted a taking of their property interests.

Judge Reinhardt concurred. Judge Reinhardt asserted that the sole argument which the water users were making on appeal was that the price to be charged for the use of groundwater should be governed by state, rather than federal, law. Judge Reinhardt would have ruled only that federal law was controlling and would have reached no other issues.

Flint v. United States, 9th Cir. No. 89-35110 (June 27, 1990)
(Wright, Reinhardt, O'Scannlain) D.J. No. 90-1-2-1302

Attorneys: Peter R. Steenland, (FTS) 368-2748 or (202) 514-2748
Robert L. Klarquist, (FTS) 368-2731 or (202) 514-2731

* * * * *

Clean Water Act And Resource Conservation And Recovery Act (RCRA) Waive The Sovereign Immunity Of The United States To State Penalty

Ohio filed suit against the Department of Energy (DOE) and its private contractors under the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA), RCRA, the Clean Water Act (CWA), and state environmental laws, seeking, inter alia, to impose civil penalties against DOE for the improper disposal of hazardous wastes at DOE's nuclear weapons plant in Fernald, Ohio. DOE moved to dismiss the claims for civil penalties as barred by the sovereign immunity of the federal government. The district court denied the motion, holding that sovereign immunity was waived under RCRA and the Clean Water Act.

On interlocutory appeal, the Sixth Circuit, by a divided panel, affirmed. With respect to the CWA, the majority held Congress waived sovereign immunity in CWA Section 313, 33 U.S.C. 1323, holding that Section 1323 subjects DOE to "any requirement," including "sanctions," "to the same extent as any nongovernmental entity" under the Act waives sovereign immunity because the language of the waiver "clearly includes civil penalties." The majority also held that because of the legislative scheme of the Clean Water Act, Ohio's claims under the state water pollution law "arise under" federal law. With respect to RCRA, the court held unanimously that Congress did not waive sovereign immunity for civil penalties under the general waiver provision of the Act, Section 6001, (42 U.S.C. §6961). The majority held, however, that Congress clearly waived the federal government's sovereign immunity for civil penalties by the citizen suit provision of RCRA, Section 7002 (42 U.S.C. §6972).

Judge Guy dissented. He wrote that the general waiver provision of the Clean Water Act (Section 313(a), 33 U.S.C.) leads to the inescapable conclusion that Congress has waived sovereign immunity for all civil penalties arising under federal, but not state, law. Agreeing with the Ninth Circuit's program does not "arise" under federal law. He also disagreed with the panel's conclusion that the citizen's suit provision of RCRA, Section 7002 authorizes penalties against the United States because RCRA 3008(a)(g) does not name the United States as "person" for purposes of civil penalties arising under federal law.

State of Ohio v. Department of Energy, 6th Cir. No. 89-3329
(June 11, 1990) (Martin; Jones; dissent, Guy) DJ # 90-7-5-13

Attorneys: Jacques B. Gelin, (FTS) 368-2762 or (202) 514-2762
Robert L. Klarquist, (FTS) 368-2731 or (202) 514-2731

* * * * *

TAX DIVISION

Government Prevails in Massive Barrister Tax Shelter Case

After a nine-week trial (which we believe is the longest civil trial in the Tax Division's history), a jury held that the seven taxpayers in Barrister Associates et al. v. United States were liable for penalties exceeding $15 million.

These cases and a related case in the Southern District of Florida involve penalties assessed under Section 6700 of the Internal Revenue Code against participants in an abusive tax shelter known as the "Barrister Book Shelter." The promoters of this shelter created 95 limited partnerships, through which they marketed over 4,000 partnership interests in book properties that were grossly overvalued. The potential tax loss to the U.S. Treasury exceeded $240 million.

* * * * *

Supreme Court Rules In Government's Favor In Case Involving Tax-Exempt Social Clubs

On June 21, 1990, the Supreme Court, resolving a conflict in the circuits, entered a unanimous decision for the Government in Portland Golf v. Commissioner. Social clubs, unlike some other tax-exempt organizations, are subject to tax on their investment income. The question presented in this case was whether a tax-exempt social club could deduct losses incurred by it in its sale of food and beverages to nonmembers from its taxable investment income. That question turns on whether the taxpayer engaged in this business with a profit motive. The Supreme Court found that the requisite profit motive was lacking and upheld the disallowance of the claimed loss deductions. This decision resolves in the Government's favor an issue that affects thousands of social clubs nationwide and that has generated much litigation in recent years.

* * * * *

Tax Protesters Convicted Of Filing False Forms 1099

On July 12, 1990, after a three-hour bench trial in Albuquerque, New Mexico, Judge Jose Burciaga found Jean Canon guilty on sixteen counts of submitting fictitious Forms 1099 to the IRS and one count of filing a false claim for refund. Canon sent false Forms 1099 to individuals he sought to harass or intimidate and sent copies of the Forms 1099 to the Service, reporting income that had not, in fact, been paid. This same technique was used by Peggy Williams who was found guilty on six counts of submitting false Forms 1099 in a bench trial conducted in Albuquerque by Judge Joseph Parker on July 16, 1990. Attorneys from our Southern Criminal Enforcement Section prosecuted both cases at the request of the United States Attorney for the District of New Mexico.

* * * * *

Texas District Court Holds That Tax Protester Cannot Attack Validity Of A Tax Assessment In A Quiet Title Action

In a revival of tax protester activity, individual protesters are attacking the validity of tax assessments against them and seeking to delay the collection activities of the IRS through quiet title actions filed pursuant to 28 U.S.C. §2410. Recently, the United States District Court for the Northern District of Texas dismissed such a suit, holding that questions concerning the validity of an assessment are not properly the subject of a quiet title action, but rather may be raised only in a refund suit filed after the tax is paid. (McCarty v. United States, Civ. No. 89-2902-D (June 7, 1990).

* * * * *

Resolution Trust Corporation (RTC) Sues To Ascertain The Status Of Federal Tax Liens

The Resolution Trust Corporation (RTC), as conservator of Delta Saving & Loan, has begun an action in the United States District Court for the Eastern District of Louisiana to determine the validity of a tax lien on residential property. RTC's predecessor had attempted to foreclose its senior mortgage on the property but failed to give notice to the Internal Revenue Service, as required by Section 7425. The case is noteworthy because the Government -- and only the Government -- is on both sides of the issue.

* * * * *

Fifth Circuit Holds Taxpayers Waived Constitutional Objection To Tax Court Special Trial Judge Appointments

The Fifth Circuit recently affirmed the Tax Court's favorable decision in Freytag, et al v. Commissioner, the first of several "test cases" involving the tax treatment of investments in a commodity straddle program operated by First Western Government Securities. This "tax shelter" has generated over 3,000 cases involving, in the aggregate, several hundred million dollars of taxes. These cases were tried in the Tax Court by a Special Trial Judge, whose recommended opinion in favor of the Government was adopted by the Chief Judge of the Tax Court. On appeal, the taxpayers challenged the assignment of the Special Trial Judge, arguing that he was not properly appointed under Article 1, Section 2, of the Constitution. The Fifth Circuit held that, since the taxpayers had consented to the assignment at the time it was made, they had waived any objection under the Appointment Clause. However, this constitutional question is presented in a related interlocutory appeal now pending in the Second Circuit. Samuel, Kramer & Co. v. Commissioner. In that case, the taxpayer did not formally consent to the assignment of its case to a Special Trial Judge.

* * * * *

Ninth Circuit Holds That Recordings Of Meetings Between Church Of Scientology Officials And Church Lawyers May Be Ordered Disclosed Pursuant To Crime-Fraud Exception To Attorney-Client Privileges

After a five-year struggle, the Ninth Circuit ruled on June 20, 1990, that evidence produced by the Government, including partial transcripts which it had obtained of meetings between Church of Scientology officials and Church lawyers, showed that the tape-recorded discussions between these officials and Church lawyers were part of an on-going effort to "cover up past criminal wrong-doing" and "involved the discussion and planning for future fraud against the IRS." United States v. Zolin, Slip. Op. Nos. 85-6065, 85-6105 (June 20, 1990). Since the Government had thus shown that the attorneys involved in these discussions were "retained in order to promote intended or continuing criminal or fraudulent activity," the District Court could require that all tapes of these meetings be disclosed to the Service, pursuant to the crime-fraud exception to the attorney-client privilege.

* * * * *

Life Insurance Company Files $67 Million Refund Suit

The Western and Southern Life Insurance Company has filed suit in the United States District Court for the Southern District of Ohio to recover $67 million in taxes and interest. The primary issue involves whether the Commissioner properly determined that these life insurance companies were not entitled to revalue their life insurance reserves for universal life insurance policies in force. The secondary issue is whether the company was required to report, as interest income, amortized discount on mortgage based certificates guaranteed by the Government National Mortgage Association or whether it could include the market discount as capital gain when the face amount of the certificate was paid or the certificate was sold.

* * * * *

ADMINISTRATIVE ISSUES

Diners Club Government Card Program

In 1984, The Diners Club, Inc. began issuing charge cards to certain Federal departments and agencies to be used in connection with official government travel. Employees designated to receive Diners Club cards are to use them to pay for major expenses connected with official government travel, such as common carrier passenger tickets (air, rail, bus), lodging, meals, and automobile rentals. One of the most important conditions governing the use of the charge card is that it is to be used for official business only. Use of the card for any purchase while not on official travel, i.e., paying for a hotel, rental car, airline ticket or purchase of merchandise, is clearly prohibited. Using the card for personal reasons violates the primary condition under which the card was made available. Consequently, such a violation can lead to appropriate disciplinary action being taken against any violator.

There have been instances of unpaid accounts which reflect unfavorably upon the Department and the Executive Office for United States Attorneys. As a reminder, travelers are expected to pay Diners Club in full upon reimbursement of their travel funds. Furthermore, you are reminded that account status and charges are reviewed monthly, and those accounts not paid in a timely manner are subject to cancellation. Should this happen, individuals may find themselves unable to perform their duties due to travel restrictions brought on by their charge card abuses and/or failure to settle their accounts in a timely manner.

Additional information concerning the policies and procedures on the use of the charge card is available from your Administrative Officer.

* * * * *

Career Opportunity

Legal And Information Systems Staff, Justice Management Division

The Office of Attorney Personnel Management, Department of Justice, is recruiting an Attorney Advisor for the Legal and Information Systems Staff, Justice Management Division, to instruct Federal attorneys in the use of the Justice Retrieval and Inquiry System (JURIS), the Department's automated legal research system. The position also requires that the Attorney Advisor conduct demonstrations and lectures on JURIS, and assist in developing training aids and newsletters. This position requires extensive travel throughout the United States.

Applicants must possess a J.D. degree, be an active member of the bar in good standing (any jurisdiction), and have at least one year post-J.D. experience. Automated legal research experience and/or public speaking experience is preferred.

Applicants should submit a resume or SF-171 (Application for Federal Employment) to: James M. Gallagher, Department of Justice, JMD/LISS/LRTS, Room 129, 425 I Street, N.W., Washington, D.C. 20530. Current salary and years of experience will determine the appropriate grade and salary levels. The possible range is GS-11 ($29,891 - $38,855) to GS-12 ($35,825 - $46,571). This advertisement is in anticipation of future vacancies.

* * * * *

APPENDIX

CUMULATIVE LIST OF CHANGING FEDERAL CIVIL POSTJUDGMENT INTEREST RATES

(As provided for in the amendment to the Federal postjudgment interest statute, 28 U.S.C. §1961, effective October 1, 1982)

Effective Date	Annual Rate	Effective Date	Annual Rate
10-21-88	8.15%	01-12-90	7.74%
11-18-88	8.55%	02-14-90	7.97%
12-16-88	9.20%	03-09-90	8.36%
01-13-89	9.16%	04-06-90	8.32%
02-15-89	9.32%	05-04-90	8.70%
03-10-89	9.43%	06-01-90	8.24%
04-07-89	9.51%	06-29-90	8.09%
05-05-89	9.15%	07-27-90	7.88%
06-02-89	8.85%		
06-30-89	8.16%		
07-28-89	7.75%		
08-25-89	8.27%		
09-22-89	8.19%		
10-20-89	7.90%		
11-16-89	7.69%		
12-14-89	7.66%		

Note: For a cumulative list of Federal civil postjudgment interest rates effective October I, 1982 through December 19, 1985, see Vol. 34, No. 1, p. 25, of the United States Attorney's Bulletin, dated January 16, 1986. For a cumulative list of Federal civil postjudgment interest rates from January 17, 1986 to September 23, 1988, see Vol. 37, No. 2, p. 65, of the United States Attorneys Bulletin, dated February 15, 1989.

* * * * *

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Alabama, M	James Eldon Wilson
Alabama, S	J. B. Sessions, III
Alaska	Wevley William Shea
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California, C	Lourdes G. Baird
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* * * * *

EXHIBIT
A

Department of Justice

UPDATE ON THE FIGHT AGAINST FINANCIAL INSTITUTION FRAUD

This Administration has aggressively pursued financial institution fraud. In February 1989, during the first month of the Administration, the Attorney General identified fraud against financial institutions as one of the Department of Justice's highest enforcement priorities. That same month, the President proposed a major financial fraud legislative initiative which included stronger civil and criminal tools and major increases in penalties. The following month, March 1989, the President submitted a $36.8 million supplemental budget request for FY 1989 to meet the escalating problem of financial institution fraud. Congress twice denied the extra funding.

Prosecution Efforts Against Financial Institution Fraud

Even without new resources, the Department of Justice has aggressively pursued financial institution fraud achieving impressive results:

- 791 major fraud (losses over $100,000) convictions for financial institutions fraud in 1989, including both banks and savings and loans.
- 530 active FBI investigations of failed financial institutions in 1990, an increase of 88% from 1987.

In 1987, the Department established the Dallas Task Force, using existing Criminal Division resources and the resources of other agencies to supplement the work of the U.S. Attorney's Office. Today, the Task Force consists of 22 Assistant U.S. Attorneys and Fraud Section attorneys, 3 Tax Division lawyers, 36 FBI agents, 16 IRS Agents, and 3 Office of Thrift Supervision examiners.

In three years, the Task Force has achieved substantial results. It has:

- brought criminal charges against 77 defendants
- obtained 52 convictions, 40 of which relate to savings and loan institutions.

It currently has 42 separate savings and loan associations and 560 persons under investigation. Based on the success of the Dallas Task Force, the Attorney General is expanding the task force concept to a total of 27 cities.

In late November, 1989, the Congress appropriated almost $50 million, which the President had sought earlier that year. As the Department has received these additional resources, it has increased its enforcement efforts and worked to ensure that sufficient resources are focused on the most important cases -- those involving high losses, the weakening or failure of an institution or potential insider fraud. These funds will support:

- 153 FBI agents.
- 118 Assistant U.S. Attorneys.
- 24 Fraud Section attorneys.
- 100 accounting technicians.
- 6 Tax Division attorneys.

In addition, the FBI has already shifted 49 agents to augment the FIRREA financial institution effort and 18 more agents are in the process of being shifted. Thus, a total of 220 agents are being added to the fight against financial institution fraud.

Additional Administrative Efforts Against Financial Institution Fraud

The Attorney General has taken additional administrative steps to address this important problem. He has established the position of Special Counsel for Financial Institutions, reporting to the Deputy Attorney General. The Special Counsel's sole responsibility is to coordinate all matters concerning the investigation and prosecution of financial institution fraud. Additionally, the Special Counsel will ensure that the resources are properly allocated to the most significant financial institution fraud cases. The Attorney General directed the creation of a Financial Fraud Coordinating Unit within the Deputy Attorney General's Office to support the work of the Special Counsel.

The Attorney General and Secretary of the Treasury have formed an interagency group of senior officials from the Department of Justice, Department of Treasury, Federal Bureau of Investigation, Office of Thrift Supervision, Federal Deposit Insurance Corporation, Comptroller of the Currency, Board of Governors of the Federal Reserve System, Resolution Trust Corporation, the National Credit Union Administration, and the Attorney General's Advisory Committee of U.S. Attorneys. This group will prioritize the significant savings and loan cases to be investigated and prosecuted. Chaired by the Special Counsel, this group will enhance interagency coordination and assist in accelerating the investigation and prosecution of these financial institution fraud cases.

To further assist in this effort, the Attorney General and Secretary of the Treasury have directed the creation of a "rapid response team" of specialized attorneys and auditors drawn from the Department's Civil and Criminal Divisions, the Office of Thrift Supervision, the Office of the Comptroller of the Currency, the FDIC, and the RTC to concentrate immediate and joint enforcement efforts on selected financial institutions victimized by potentially criminal activity. Upon short notification, this squad will take all appropriate action to preserve assets of an institution, protect the vital documents and records, and undertake an immediate investigation.

The resources of other agencies will also be brought to bear on this problem. The Resolution Trust Corporation has established an Office of Investigations and a national network of investigative teams. Approximately 300 new investigative staff will be added by the end of this year. The IRS will continue to prosecute aggressively individuals who commit tax fraud involving failed financial institutions. The Office of Thrift Supervision has recently opened a new regional enforcement office sited in its Jersey City, New Jersey, office to enhance its enforcement capabilities. OTS intends to open at least two additional regional enforcement offices before the end of 1990.

Additional Legislative Efforts Against Financial Institution Fraud

The Administration supports the package of legislative proposals that provide important additional enforcement tools to attack, civilly and criminally, financial institution fraud. The Departments of Justice and Treasury worked closely with the legislative sponsors in the development of these measures. The proposals will mobilize government-wide resources by allowing the Department of Justice to use, without reimbursement, attorneys,

investigators, accountants, and other personnel from appropriate agencies. Also included is a provision to allow law enforcement agencies to request court-authorized wiretaps to investigate bank fraud, false statements to financial institutions, bribery of bank officials, and related offenses for which wiretap authority is not presently available.

The legislative package contains other significant measures. Cases brought by the FDIC and the RTC will receive priority consideration by the courts. Also, procedures for expedited appeals of these cases will be established. The Department of Justice, the FDIC, the RTC and Office of Thrift Supervision will be authorized to seek court orders to freeze the corporate and personal debts of defendants in civil financial institution fraud cases. In addition, the claims of the Federal Government will receive priority over those of creditors in bankruptcy and other claimants in suits against parties responsible for losses due to financial institution fraud.

The legislation further allows the seizure of assets and property in mail fraud and wire fraud prosecutions involving financial institutions. It will also authorize federal banking agencies to receive from, and provide assistance to, foreign banking authorities to detect banking law violations. The legislation makes it a crime to knowingly conceal assets or property that is subject to a claim by a federal banking agency. The proposals also permit the subpoena authority of FDIC and RTC to apply to failed, as well as operating, financial institutions. Finally, the RTC and the FDIC will be authorized to undo fraudulent conveyances dating back five years.

Victims of financial institution fraud will receive enhanced protection when the legislation is enacted. The legislation authorizes courts to order payment of restitution to <u>all</u> victims of financial institution fraud schemes even where they were not identified in the charges underlying the conviction. Perpetrators of financial institution fraud will be prohibited from using the bankruptcy laws to avoid payment of damages, penalties and forfeitures that are used to reimburse victims.

These new measures will be especially effective when combined with the authority granted in FIRREA. Enacted in August 1989, FIRREA authorized a number of expanded enforcement powers, increased penalties, and procedural improvements to facilitate financial institution investigations and prosecutions. The new law provided (a) increased and expanded civil penalties of up to $1 million (with $5 million for continuing violations) and criminal penalties of up to 20 years' imprisonment; (b) extended civil and criminal forfeiture authority to a number of financial institution related offenses; (c) amended grand jury secrecy protection to facilitate the use of grand jury information in

seeking civil actions related to financial institution offenses; (d) made bank fraud a RICO predicate offense; and (e) amended the Right to Financial Privacy Act and federal criminal code to prohibit financial institutions from disclosing that records were being sought pursuant to a grand jury subpoena related to financial institution offenses.

U.S. Department of Justice

Office of the Deputy Attorney General

Executive Office for Asset Forfeiture

Washington, D.C. 20530

EXHIBIT B

July 3, 1990

MEMORANDUM

TO: All United States Attorneys Offices
Assistant Attorney General, Criminal Division
Director, Federal Bureau of Investigation
Administrator, Drug Enforcement Administration
Commissioner, Immigration and Naturalization Service
Director, United States Marshals Service

FROM: Cary H. Copeland CHC
Director
Executive Office for Asset Forfeiture
Office of the Deputy Attorney General

SUBJECT: Forfeiture Policies

A. The Payment of State and Local Taxes on Seized or Forfeited Property

An issue that is arising with increasing frequency is whether the Department of Justice may pay State and local taxes on property seized for forfeiture. This issue arises most often with respect to real property. The Department's position is that the doctrine of sovereign immunity precludes the payment of State and local taxes on property which has been seized for federal forfeiture.

While there is some precedent for a consensual waiver of sovereign immunity, courts have consistently held that they will only compel the United States to pay State or local taxes where there has been a "clear, express and affirmative" waiver of sovereign immunity. United States v. City of Adair, Iowa, 539 F.2D 1185, 1189 (8th Cir. 1976).

Congress has, in an analogous area, enacted legislation explicitly directing payment of State and local taxes on properties financed by the Farmers Home Administration. 42 U.S.C. § 1490(h). Although it has been suggested that our authority to pay "valid liens" against forfeited property (28 U.S.C. § 524(c)(1)(D)) could be construed to encompass State and

local tax liabilities, we do not believe that this provision of law was intended to waive sovereign immunity from State and local taxation. The contrast between 42 U.S.C. § 1490(h) and 28 U.S.C. § 524(c)(1)(D) is striking.

It is the Department's position that the date of the seizure marks the imposition of sovereign immunity. Therefore the Department will not pay State or local taxes incurred after the property is seized for forfeiture. If tax liens have already been levied against the property prior to seizure, these liens will be honored. They may be paid under the authority provided in 28 U.S.C. § 524(C)( )(d) or, if state law allows, conveyed to a purchaser by the United States. If conveyed to a purchaser, the U.S. Marshals Service shall assure that the corresponding reduction in sales price does not exceed the lien if paid by the United States.

B. Purchase or Personal Use of Forfeited Property by DOJ Employees

Department of Justice employees are generally prohibited from purchasing property that has been forfeited to the Government and is being sold by the Department of Justice or its agents. This policy is intended to ensure that there is no actual or apparent use of inside information by employees wishing to purchase such property. The purpose of this policy is to protect the integrity of the asset forfeiture program.

A proposed rule to the above effect will soon be published in the Federal Register. The rule will provide a very narrow waiver provision with the approval of the head of the employee's component.

Although we are unaware that any such purchases have occurred, this policy will avoid problems before they develop. We believe it is important to the integrity of the Department's forfeiture program that we preclude even the appearance of a conflict of interest which would otherwise arise should a Department employee purchase forfeited property.

C. Seized Cash Held for Evidence

My memorandum dated February 14, 1990, reiterated the longstanding Department policy requiring seized cash to be deposited promptly in the Seized Asset Deposit Fund except where its retention for use as evidence is essential. In those cases, a waiver must be obtained from the Assistant Attorney General of the Criminal Division. A recent review of cash being held as evidence identified over $20 million that should have been deposited. In view of this experience, we will conduct similar

reviews of cash being held as evidence each quarter. A separate memorandum will be sent out shortly to the seizing agencies requesting an inventory of cash being held as of June 30, 1990.

D. Transfer of Funds From the Seized Asset Deposit Fund to the Assets Forfeiture Fund

The September 7, 1989, statement of policy on the timing of transfers from the deposit fund to the forfeiture fund continues in force. You should be aware that we look to the United States Attorney's Office securing the forfeiture order to be responsible for the initiation of the transfer process through its prompt notification to the U.S. Marshals Service. The subject statement of policy provided that:

> (1) In the case of either a consent judgment or a default judgment, the USMS will immediately transfer the forfeited cash to the Assets Forfeiture Fund, unless the United States Attorney determines that execution of the judgment should be delayed.
>
> (2) In the case of a judgment after trial or upon summary judgment, there is an automatic stay of execution of the judgment of 10 working days. If the United States Attorney's Office indicates that no motions or requests for additional stays have been filed, then the forfeited cash will be transferred to the Assets Forfeiture Fund on the 11th working day following a summary judgment or a judgment after trial.

cc: Barry H. Stern
Associate Deputy Attorney General

U.S. Department of Justice

Office of the Deputy Attorney General

Executive Office for Asset Forfeiture

EXHIBIT C

Washington, D.C. 20530

June 29, 1990

MEMORANDUM

TO: All United States Attorneys
Assistant Attorney General, Criminal Division
Director, Federal Bureau of Investigation
Administrator, Drug Enforcement Administration
Commissioner, Immigration and Naturalization Service
Director, United States Marshals Service

FROM: Cary H. Copeland CHC
Director
Executive Office for Asset Forfeiture

SUBJECT: Departmental Policy Regarding the Seizure and Forfeiture of Real Property that is Potentially Contaminated, or is Contaminated, with Hazardous Substances

Congress enacted the Superfund Amendment and Reauthorization Act of 1986 (SARA) 1/ to the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA). 2/ Section 120(a) of the Act 3/ imposes the liability provisions of Section 107 4/ upon the United States. Section 120(h) 5/ of the Act sets forth notice and warranting requirements which apply whenever any agency, department or instrumentality of the United States enters into a contract for the sale or other transfer of real property which is owned by the United States and on which any hazardous

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1/ Public L. No. 99-499, 100 Stat. 1966.

2/ 42 U.S.C. 9601 et seq.

3/ 42 U.S.C. 9620(a).

4/ 42 U.S.C. 9607.

5/ 42 U.S.C. 9620(h).

substance 6/ either (1) has been stored 7/ for more than one year; (2) is known to have been released; 8/ or (3) is known to have been disposed 9/ of.

The Department issued its initial policy on the seizure and forfeiture of real property that is contaminated with hazardous waste on June 23, 1989. This initial policy was based on the Environmental Protection Agency's (EPA) proposed implementing regulations to Section 120(h) of SARA.

However, on April 16, 1990, the EPA promulgated its final regulations interpreting Section 120(h). 10/ (Attachment A.) Additionally, the Environment and Natural Resources Division (Environment Division), formerly Land and Natural Resources, Department of Justice, has issued a memorandum providing guidance to federal agencies involved in forfeitures regarding notice and liability under the statute. (Attachment B.) In light of the significant changes contained within the final regulations and the Environment Division guidance, the Department is now promulgating a revised policy which supersedes the initial Departmental policy and any intervening directives by Department components.

6/ Hazardous substance means that group of substances defined as hazardous under CERCLA (42 U.S.C. 9601(14)) and 40 C.F.R. § 300.6), and that appear at 40 C.F.R. 302.4. See also 40 C.F.R. 261 App. VII, App. VIII and 40 C.F.R. 373.4(a).

7/ Storage means the holding of hazardous substances for a temporary period, at the end of which the hazardous substance is either used, neutralized, disposed of or stored elsewhere. 40 C.F.R. 373.4(b).

8/ The term "release" is broadly defined to include, inter alia, any spilling, leaking, pouring, emitting, escape, leaching, or dumping of hazardous substances into the environment. See, 42 U.S.C. 9601(22). The term encompasses both the intentional and unintentional (e.g. accidental) release of hazardous substances.

9/ The term "disposal" is broadly defined to include, inter alia, any "spilling, leaking, or placing" of any hazardous waste into or on any land or water. See, 42 U.S.C. 9601(29) (incorporating the definition of "disposal" under 42 U.S.C. 6903(3)).

10/ 40 C.F.R. 373.

Departmental Policy

It is the policy of the Department of Justice that real property that is contaminated or potentially contaminated with hazardous substances may in the exercise of discretion be seized and forfeited upon a determination by the United States Attorney (USA), in the district where the property is located, in consultation with the seizing agency and the Marshals Service, that such action is appropriate. If the USA chooses to delegate this authority to an Assistant United States Attorney, provision should be made for review by a supervisor.

This policy is applicable regardless of the type or source of the hazardous substance(s).

This policy is applicable to all cases referred to the Department by any agency of the United States.

This policy is based on the ability of the United States to invoke an "innocent owner" defense from liability for hazardous substance contamination found on real property, if such contamination resulted from a prior owner's activities, when the real property is acquired through involuntary means (this includes seizures and forfeitures, which are involuntary to the owner) if that federal agency (1) exercises due care once it takes possession of the property, (2) secures the property from other third party actions, and (3) provides notice 11/ of those hazardous substance conditions about which the United States knows when it transfers or sells the property. 12/

11/ Specifically,

> ... whenever any department, agency, or instrumentality of the United States enters into any contract for the sale or other transfer of real property which is owned by the United States and at which, during the time the property was owned by the United States, any hazardous substance was stored for one year or more, known to have been released, or disposed of, the head of such department, agency, or instrumentality must include in such contract notice of the type and quantity of such hazardous substance and notice of the time at which such storage, release, or disposal took place, to the extent such information is available on the basis of a complete search of agency files.

40 C.F.R. 373.1.

12/ 42 U.S.C. 9601(35) and 9607(b)(3).

To insure that the United States can avail itself of the "innocent owner" defense in cases involving this class of real property, once the property is seized, federal law enforcement agencies will exercise due care in relation to the property and take precautions against foreseeable acts or omissions of possible third parties. Furthermore, such real property that is forfeited will only be transferred or sold with notice of the potential or actual contamination. 13/ Notice must be based on information that is available on the basis of a complete search of agency files. 14/ This notice will be included in the contract of sale and the deed. A proposed notice is at Attachment C.

In light of the "innocent owner" defense, real property that is contaminated or potentially contaminated with hazardous substances due to the activities of a prior owner, should be transferred or sold "as is" and an environmental assessment

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13/ The notice required

> ... for the storage for one year or more of hazardous substances applies only when hazardous substances are or have been stored in quantities greater than or equal to 1000 kilograms or the hazardous substance's CERCLA reportable quantity found at 40 C.F.R. 302.4, whichever is greater. Hazardous substances that are also listed under 40 C.F.R. 261.30 as acutely hazardous wastes, and that are stored for one year or more, are subject to the notice requirement when stored in quantities greater than or equal to one kilogram.

40 C.F.R. 373.2. The notice required

> for the known release of hazardous substances applies only when hazardous substances are or have been released in quantities greater than or equal to the substance's CERCLA reportable quantity found at 40 C.F.R. 302.4.

40 C.F.R. 373.2.

14/ 42 U.S.C. 9620(h)(3); 40 C.F.R. 373.1. It is envisioned that this search will involve the seizing agency's casefile(s) relating to the real property. Additionally, the search must include any documentation generated from an environmental assessment or the removal of hazardous substances from the real property.

and/or remediation of the contamination need not be undertaken. 15/ Whenever possible, a commitment from the buyer to clean-up the property should be obtained as a part of the contract of sale.

However, if the real property becomes contaminated with a hazardous substance after the United States becomes the owner, 16/ then the "innocent owner" defense is inapplicable to that contamination. This situation normally will arise when the United States operates a business or activity on the property that results in the storage, release or disposal or hazardous substances (e.g., gasoline stations, metal plating shops, dry cleaners, printers, etc.). In this circumstance, the United States is responsible for (1) all costs of hazardous substance removal and/or remedial action; 17/ (2) providing notice of the hazardous substance to a subsequent transferee or purchaser; and (3) a warranting covenant to a subsequent transferee or purchases. 18/ Because of the potential resulting liability and

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15/ In cases involving illegal drug laboratories, the laboratories should be dismantled and all chemicals and equipment should be seized and removed in accordance with the DEA Agents Manual, Section 6674.0 et seq.

16/ For purposes of liability under CERCLA (42 U.S.C. 9607), the United States is considered an owner of real property after a final judgment of forfeiture is entered. Ownership is not construed as including the interest which vests in the United States pursuant to the "Relation Back" doctrine. (See e.g., 21 U.S.C. 881(h)).

17/ Normally, the costs of removal and/or remedial action must be borne from funds available to the agency conducting operations on the property. EPA's funds, to include the Superfund, are generally not available for remedial actions on federally owned property. See 42 U.S.C. 9611(e)(3). Short term or emergency responses, known as removal actions, may be undertaken by the Superfund at federally owned properties at the discretion of the EPA.

18/ The covenant must warrant that:

(1) all remedial action necessary to protect human health and the environment with respect to any such substance remaining on the property has been taken before the date of such transfer, and,

(2) any additional remedial action found to be necessary

(continued...)

expense, the USA should approve the operation of such a business or activity only in unusual circumstances.

This policy envisions United States Attorneys exercising discretion in the seizure and forfeiture of real property that is contaminated or potentially contaminated with hazardous substances. Normally, such properties should not be forfeited unless there is at least $30,000 in net equity belonging to the defendant. **Furthermore, such properties should not be forfeited when there is reason to believe the property is substantially contaminated with hazardous substances and that such contamination would render the property unmarketable.** Clean-up costs can be considerable particularly when the water table is involved. In making this determination, the USA may order an environmental assessment which will be paid from the Assets Forfeiture Fund. 19/

If at any point the USA elects, in the exercise of his or her discretion, not to proceed because significant contamination renders the property unmarketable, the USA should consider the following alternatives.

1. the filing of a release of Lis Pendens (assuming a Lis Pendens had been filed) containing notice of the reason (significant contamination) for dismissal of the forfeiture suit;

2. the filing of some other document in the county deed records containing notice of the significant contamination, if such filing is permitted under state law);

3. notification of a federal, state or local environmental agency of the significant contamination for purposes of appropriate enforcement action;

4. notification of any lienholders of the significant

18/(...continued)
after the date of such transfer shall be conducted by the United States.

42 U.S.C. 9620(h)(3)(B).

19/ The Chief, Environmental Quality Section, Tulsa District, U.S. Army Corps of Engineers (918-581-7877), has agreed to conduct environmental assessments for the Department on a cost basis.

contamination for such action as they may want to take; and

5. consideration of prosecution, civilly or criminally, for violations of the environmental laws by the private owners, the U.S. Attorneys Office should contact the Environment Division (Environmental Crimes or Environmental Enforcement Sections).

None of these alternatives are mandatory. Ultimately, it is within the discretion of the USA to decide how best to proceed when an election not to proceed with forfeiture is made.

Questions concerning this policy should be directed to the Asset Forfeiture Office, Criminal Division (202-514-1263 or FTS 368-1263).

Attachments

cc: Barry H. Stern
Associate Deputy Attorney General

ATTACHMENT A

federal register

Monday
April 16, 1990

Part IV

Environmental Protection Agency

40 CFR Part 373
Reporting Hazardous Substance Activity When Selling or Transferring Federal Real Property; Final Rule

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 373

[SWH FRL-3383-9]

Reporting Hazardous Substance Activity When Selling or Transferring Federal Real Property

AGENCY: Environmental Protection Agency.

ACTION: Final rule.

SUMMARY: The Environmental Protection Agency (EPA) is today promulgating regulations in response to requirements established by section 120(h) of the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA), as amended by the Superfund Amendments and Reauthorization Act of 1986 (Pub. L. 99-499). Under section 120(h), whenever any agency, department, or instrumentality of the United States enters into any contract for the sale or other transfer of real property which is owned by the United States, and on which any hazardous substance was stored for one year or more, known to have been released, or disposed of, the contract must include notice of the type and quantity of such hazardous substance, and the time at which such storage, release, or disposal took place. EPA is to prescribe the form and manner of such notice. Today's final rule defines when these requirements apply, and prescribes the form and manner of notice, as required by section 120(h).

EFFECTIVE DATE: This final rule is effective October 17, 1990. These regulations and other requirements of section 120(h) of the Act apply to real property owned by the United States that is sold or transferred after October 18, 1990.

ADDRESSES: The official record for this rulemaking is identified as Docket Number 120FP-TR and is located in the EPA Superfund Docket Room (LG 100), 401 M Street, SW., Washington, DC 20460. The docket is open from 9 a.m. to 4 p.m. Monday through Friday except for public holidays. To review docket materials, make an appointment by calling 202-382-3046. The public may obtain copies of docket materials as provided for in 40 CFR part 2. A fee may be charged for copying services.

FOR FURTHER INFORMATION CONTACT: For general information contact the RCRA/CERCLA Hotline at 1-800-424-9346 (toll-free) or in the Washington Metropolitan Area at 202-382-3000. For information on specific aspects of this final rule, contact the Office of Waste Programs Enforcement (OS-510), U.S. Environmental Protection Agency, 401 M Street, SW., Washington, DC 20460, 202-475-6770.

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I. Introduction

A. Statutory Authority

The Superfund Amendments and Reauthorization Act (SARA), Public Law 99-499, amended the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA), 42 U.S.C. section 9601 *et seq.* SARA added section 120(h)(1) of CERCLA which states that

> * * * whenever any department, agency, or instrumentality of the United States enters into any contract for the sale or other transfer of real property which is owned by the United States and on which any hazardous substance was stored for one year or more, known to be released, or disposed of, the head of such department, agency, or instrumentality shall include in such contract notice of the type and quantity of such hazardous substance and notice of the time at which such storage, release, or disposal took place, to the extent such information is available on the basis of a complete search of agency files.

Section 120(h)(2) requires the Environmental Protection Agency (EPA) to promulgate regulations specifying the form and manner of such notice no later than 18 months after enactment of SARA. The notice is required for U.S. property, as described below in further detail, that is sold or transferred six months after the effective date of the regulation.

On January 13, 1988, EPA published proposed rules that would implement the notice requirements of section 120(h)(1).

B. Interagency Coordination

The statute specifies that EPA is to develop the notice regulations required by section 120(h)(2) in consultation with the Administrator of the General Services Administration (GSA). The Agency worked closely with GSA in the development of the proposal, and has consulted with GSA throughout the development of this final rule. Additionally, EPA actively solicited information and comment from other potentially affected agencies during the proposal stage, and received a number of comments on the proposed rule.

II. Responses to Major Public Comments on the Proposed Rule

A document summarizing the comments and responses thereto is available in the public docket to this final rule. The major issues raised by the commenters, and the Agency's response to those issues, are discussed below.

A. "Transfer" of Real Property

Section 120(h) of CERCLA states that its requirements apply to the sale or *other transfer* (emphasis added) of real property which is owned by the United States. In the proposed rule, EPA did not define "transfer" but presumed that the term "transfer" in the statute is used pursuant to its definition in the Federal Property Management Regulations (FPMR) found at 41 CFR part 101-47, and that the proposed regulations would apply to agencies undertaking the activity defined therein. Several problems were noted with this definition.

First, several commenters noted that they were unable to find the definition of "transfer" in the FPMR. Second, one commenter stated that since the Agency used the FPMR to define transfer, EPA should also use the FPMR's definition of "real property."

Determining what constitutes a "transfer" of real property is important for implementing the requirements of section 120(h). EPA referred to the FPMR at 41 CFR 101-47.203-2 in order to make sure that federal agencies realized that the proposed regulations applied to transfers of property *between* agencies. EPA believes that, since the statute consistently uses the word "any" as in "whenever *any* department, agency, or instrumentality enters into *any* contract for the sale or transfer of property owned by the United States * * * *each* deed shall contain covenants * * *" it appears clear that the statute and today's rules must apply to federally owned real property sales and transfers between agencies of the United States, between the United States and private parties, and between the United States and state and local governments.

As previously stated, one commenter suggested that "real property" should be

defined pursuant to the definition found in the FPMR at § 101-47.103-12. However, that definition excludes many types of public lands from being considered real property. As discussed above, EPA believes that real property is a broad concept. Using the definition of real property in the FPMR would greatly limit the applicability of section 120(h), and consequently undermine protection of human health and the environment.

In summary, EPA intends that the regulations implementing section 120(h) apply to the sale or transfer of all real property, and that today's final rule applies whenever any agency, department or instrumentality of the United States enters into any contract for the sale or other transfer of real property.

One commenter suggested that grants of easements permanently conveying use, occupancy, and control of real property, and leases with options to buy, be treated as the equivalent of fee simple conveyances. However, another commenter suggested that the requirements of section 120(h)(1) apply only to fee simple conveyances, and not to transfers of property rights such as easements. Still another commenter suggested that the rule implementing section 120(h)(1) not apply to transfers of leases between government agencies.

The questions of whether and to what extent leases and easements should be included among the types of property subject to these regulations was not addressed by EPA in developing the proposed rule. These questions involve a complicated area of real property law, and may be affected by specific deed or lease terms and by state common law. Accordingly, EPA has not addressed these issues in the final rule.

B. Department, Agency, or Instrumentality

Early in the development of the proposed rule, EPA received several informal inquiries regarding whether or not a particular organization was to be considered a department, agency, or instrumentality of the United States and, therefore, subject to the requirements of section 120(h)(1). To clarify this, EPA stated in the proposed rule that, for the purposes of implementing the requirements of section 120(h)(1), "department, agency, or instrumentality of the United States" means those entities or organizations created or chartered by the legislative, executive or judicial branches of the federal government, including those corporations that are chartered by the federal government.

Several organizations commented on the applicability of section 120(h) with regard to their status as "instrumentalities" of the United States. One commenter suggested that, because the term "instrumentality" of the United States is a "term of art" applicable to many entities created by the United States for widely varying purposes, the term must be used with great care in regulatory proceedings to avoid misinterpretation or unintended application to particular circumstances. The commenter also stated that its organization was not a department, agency or instrumentality of the United States within the meaning of section 120 of CERCLA. However, the commenter later stated that EPA itself should not seek to determine by regulation the significant policy and technical issues surrounding the interpretation of section 120(h)(1) with respect to certain federal instrumentalities, including the commenter.

From the above, it appears that the commenter considers itself to be, under certain conditions, an instrumentality of the United States. However, EPA believes that the commenter's status as an instrumentality of the United States is not so flexible as to allow its consideration as such under some circumstances but not under others. Therefore, since the commenter has stated that it is a federal instrumentality, and since the statute clearly states that the requirements of section 120(h) apply to "*any* department, agency, or *instrumentality* of the United States" (emphasis added), EPA believes that the requirements of section 120(h)(1) are applicable to the commenter. However, EPA does agree with the commenter that the precise definition of what is or is not an "instrumentality" of the United States is beyond the scope of today's rule. Rather than attempt such a definition here, EPA has decided to leave this determination to a case-by-case basis. Therefore, the Agency has deleted the definition of "department, agency or instrumentality" from the final rule.

Another commenter stated that, while generally considered an instrumentality of the United States, there are specific differences between itself and other entities of government which show that federal control over its organization is far from complete. While EPA agrees that the examples provided by the commenter illustrate the differences between the commenter's organization and most other federal entities, the Agency believes that this rulemaking is not the appropriate place to make a determination of whether the commenter is or is not an "instrumentality" for the purposes of implementing section 120(h).

In a related comment, the second commenter stated that property acquired by its organization through foreclosure and, therefore, potentially subject to the requirements of section 120(h)(1) when sold, is owned by the corporate instrumentality rather than the United States. Since section 120(h) applies only to property owned by the United States, the commenter believes that property it owns and sells as a corporate instrumentality acting for the United States would not be subject to the requirements of section 120(h)(1).

This comment thus raises the broader question of when and under what conditions property owned by a federal instrumentality is owned by the United States. EPA believes that the resolution of this question involves considerations beyond the scope of today's rule and, therefore, should not be attempted here. EPA expects that existing statutory and case law will be applied in the appropriate circumstances to determine whether property is owned by the United States and therefore subject to this rule.

C. The Concept of Real Property

As noted in II. A. above, EPA received comment on, and has decided not to use, the definition of "real property" found in the FPMR for the purposes of implementing the requirements of section 120(h)(1). Because the law of real property has evolved primarily at the state level, EPA believes it is most appropriate to take into consideration the common law of the state in which the property lies in determining whether a particular ownership right constitutes "real property" for the purposes of this rule. However, as a general guide, EPA notes that the term real property is generally used to "designate both things which are permanent, fixed, and immovable, as lands, and rights arising out of, or connected with, lands; and includes land and whatever is affixed thereto, and rights arising out of, or annexed to or exercisable within or about, the land" (73 C.J.S. *Property* section 10, 1983).

D. Application to Custodial Property

In the preamble to the proposed rule, EPA expressed doubt that Congress intended the notice and covenant requirements of this sub-section to apply to properties obtained by the United States through foreclosure and held in a custodial manner until sale. A number of commenters also argued more broadly that the sub-section should not apply in

a variety of circumstances where the storage, release or disposal occurred before the federal government owned the property. EPA agrees with these commenters in part, and disagrees in part, as discussed below.

EPA believes that the concern of Congress in enacting section 120(h) was with federally owned facilities whose own operations might involve storage, disposal or release of hazardous substances. The types of facilities cited in Congressional discussion of section 120 included military bases, Department of Energy nuclear production facilities, and other civilian installations. Moreover, nothing in the text or legislative history of the statute suggests that Congress meant to require agencies which had not in some manner been responsible for the storage, release or disposal of hazardous substances to unilaterally assume the obligation in section 120(h)(3) of remedying the contamination prior to sale and warranting that contamination that came to light after sale would also be corrected. In addition, section 120(h)(1) requires the notice to contain information about the type and quantity of hazardous substance stored, released, or disposed of, and the time at which such storage, release or disposal took place. It is unlikely that the agency would be expected to have such detailed information with respect to an activity which took place before the agency held the property.

Therefore, it is EPA's belief, in the light of the overall statutory scheme, that section 120(h)(1) was meant to apply where the storage, release, or disposal referred to in the statute occurred during the time the property was owned by the Federal government. It is EPA's view, after considering the comments it has received, that this is a more appropriate interpretation of section 120(h)(1) than its earlier approach (and similar approaches suggested by some commenters) which focused on the manner in which the property was acquired.

The proposed rule contained a specific exemption for small residential properties acquired by foreclosure. As discussed above, EPA now views such an exemption as inappropriate. Moreover, EPA believes that it is inappropriate to include substantive exemptions in the rule itself, because by statute the rule is primarily intended to address the "form and manner" of the notice to be given. Therefore, the rule promulgated today does not contain any such exemptions.

One commenter stated that the proposed exclusion for residential property should extend to all real property, including commercial and industrial real property, that may be acquired by Federal lending agencies through foreclosure or settlement. Specifically, the commenter, which is an organization that makes non-residential loans, recommended that "* * * Federal lending agencies which obtain property through foreclosure or settlement, and then hold that property in a custodial manner until resale, should be exempt from the requirements set forth not only in the proposed regulations, * * * but also in 42 U.S.C. section 9620(h) and, indeed, in all other sections of CERCLA, including 42 U.S.C. 9607(a), which impose obligations and liability upon persons merely because they are deemed to be owners or operators of a facility." In particular, the commenter suggested that the "innocent landowner" defense in 101(35)(A) of CERCLA might exempt federal lending agencies from the notice requirement of section 120(h)(1) as well as from liability under section 107.

EPA does not believe that a generic exemption for commercial or industrial property acquired by foreclosure would be consistent with congressional intent. In EPA's view, the duty to give notice is not a function of the manner in which property was acquired but of what circumstances occur while it is owned by the government. The policy concerns underlying the request for such an exemption would not arise under EPA's interpretation of 120(h)(1) as applying only where storage, release or disposal occurs while the property is owned by the government.

With respect to the commenter's suggestion that liability under 42 U.S.C. 9607 should not extend to property acquired by the government through foreclosure, EPA believes it would be inappropriate to attempt to resolve in today's rulemaking the application of CERCLA provisions other than section 120(h)(1). EPA also notes that the "innocent landowner" defense cited by the commenter contains its own notice requirement at section 101(35)(C), which may be relevant to agencies acquiring previously contaminated property, whether or not they must also give notice under section 120(h)(1).

E. Requirement to Search Agency Files

Several commenters stated that the Agency's proposed definition of a complete search of agency files would impose a significant financial burden on the agencies selling or transferring real property, and would prolong the length of time it takes to sell such property. Additionally, one commenter suggested that EPA did not have the authority to define each agency's responsibilities for conducting the file search. Yet another commenter requested that EPA clarify what was meant by the phrase "obtainable without undue burden" in the definition of a complete search of agency files.

EPA anticipates that federal agencies will make a reasonable and good faith effort to identify potential hazardous substance contamination on federally owned real property. Beyond this general statement, it would be very difficult to reasonably define this term without reference to the myriad of situations under which the different agencies will become subject to the requirements of section 120(h)(1). It is, therefore, difficult to provide an effective yet reasonable framework in the regulation for a complete search. EPA has therefore dropped the definition of "complete search of agency files" from the regulation.

F. Definitions

EPA did not receive any comments on the specific definitions that were proposed for *hazardous substances, storage, release,* and *disposal.* Therefore, the proposed definitions for those terms have been incorporated into today's final rule.

However, one commenter requested clarification on whether or not the notification requirement for section 120(h) applies to asbestos-containing products that are structurally integrated into any buildings that are part of Federal real property that is sold or transferred. While EPA under CERCLA has broad authority to regulate asbestos, defining the circumstances of where that jurisdiction applies goes beyond the scope of today's rule.

Additionally, several comments were received on the proposed quantitative level below which the notice requirement for the storage of hazardous substances would not apply (in other words, the storage trigger), and on the possibility of establishing triggers for release and disposal. These comments are addressed below.

1. Storage Trigger

In the proposed rule, EPA stated that requiring Federal agencies disposing of real property to report on very small quantities of hazardous substances that have been stored on the property would be burdensome and probably would not contribute significantly to the protection of human health and the environment. Additionally, the Agency stated that the storage of hazardous substances is not tantamount to their release and/or disposal and, in turn, may present less of an environmental threat. For various

reasons discussed in the proposal, but especially because generators of 100 kilograms or less per month of hazardous waste are allowed to store up to 1000 kilograms on site. EPA proposed that 1000 kilograms would be an appropriate trigger level for the section 120(h)(1) notice requirement for the storage of hazardous substances.

Several commenters suggested using the reportable quantities (RQs) for CERCLA hazardous substances found at 40 CFR 302.4 as the quantitative level below which the storage of hazardous substances would not require notice under section 120(h).

EPA has considered such an approach, and has adopted it in part in today's final rule. The Agency still maintains that there is a significant difference between the storage and the release of hazardous substances. Because the RQ values are based on the relative degree of hazard presented to human health and the environment when hazardous substances are released, EPA believes that their general use as the trigger for the notification of the storage of hazardous substances would be overly conservative. However, in some instances, the RQ for a particular hazardous substance is well over the proposed 1000 kilogram storage trigger, resulting in situations where the storage of a hazardous substance would require notification while its release would not. Therefore, in order to avoid this contradiction, today's final rule sets the quantitative level below which the storage of hazardous substances for one year or more would not require notification under section 120(h)(1) at the greater of either 1000 kilograms or the reportable quantity for the particular hazardous substance found at 40 CFR 302.4. Additionally, it should be noted that reporting the storage of hazardous substances will only be required when the greater of either 1000 kilograms or the RQ is stored for a period of one entire year. As in the proposed rule, the exception to this is for those items that are both CERCLA hazardous substances and acutely hazardous wastes under the Resource Conservation and Recovery Act (RCRA). Today's final rule establishes the notice trigger for the storage of those substances at one kilogram.

2. Triggers for release and disposal.

Several commenters suggested using the RQs to establish triggers for notifying buyers of the release of hazardous substances under section 120(h)(1). EPA has considered this approach, and believes that it is logical, reasonable, and appropriate to use the RQ values as levels below which the release of hazardous substances will not require notification under section 120(h), and has incorporated these release triggers into today's final rule.

One commenter suggested using RQ values as quantitative levels below which the notice requirement for the disposal of hazardous substances under section 120(h)(1) would not apply. EPA has considered incorporating such an approach into the final rule. However, since the disposal of hazardous substances is normally managed under the Resource Conservation and Recovery Act (RCRA), which has not established any type of quantitative triggers for such an activity, EPA has not promulgated a trigger for reporting the disposal of hazardous substances under section 120(h)(1) in today's final rule.

C. Form and Manner of Notice

Several commenters stated that while the information proposed to be required in the section 120(h)(1) notice is appropriate, EPA should require that GSA form 118b be used whenever property is sold or transferred through GSA. One commenter also stated that property that is transferred to private ownership without GSA involvement should use the information required by EPA as additional language in the conveyance rather than by creating a new form.

EPA agrees that GSA form 118b is the appropriate vehicle for the disclosure of information required by section 120(h)(1) when the property is sold or transferred by GSA. However, since GSA has indicated that it will amend the information requirements of 118b to reflect the type of information proposed by EPA to implement the requirements of section 120(h), EPA sees no need to state that 118b is specifically required. In today's final rule, EPA simply requires that the specific information described in the proposed rule be included with the contract of sale, and notes that standard GSA operating procedure will require the modified form 118b in properties handled by GSA.

III. Regulatory Analyses

A. Regulatory Impact Analysis

Executive Order No. 12291 requires EPA to assess the effect of contemplated Agency actions during the development of regulations. Such an assessment consists of a quantification of the potential benefits and costs of the rule, as well as a description of any beneficial or adverse effects that cannot be quantified in monetary terms. In addition, Executive Order 12291 requires that regulatory agencies prepare an analysis of the regulatory impact of major rules. Major rules are defined as those likely to result in:

1. An annual cost to economy of $100 million or more; or

2. A major increase in costs or prices for consumers or individual industries; or

3. Significant adverse effects on competition, employment, investment, innovation, or international trade.

Because this proposed rule affects only agencies, departments, or instrumentalities of the United States, no formal Regulatory Impact Analysis was conducted. However, EPA has concluded, based on a survey of the number of properties federal agencies sell or transfer each year, and the cost to the agency of complying with the notice provisions of section 120(h)(1), that the cost of the regulation to the government falls well below the $100 million threshold of a major rule.

This rule has been submitted to the Office of Management and Budget for review as required by Executive Order No. 12291.

B. Regulatory Flexibility Analysis

Pursuant to the Regulatory Flexibility Act, 5 U.S.C 601 *et seq.*, whenever an agency is required to publish a notice of rulemaking for any proposed or final rule, it must prepare and make available for public comment a regulatory flexibility analysis that describes the effect of the rule on small entities (i.e., small businesses, small organizations, and small governmental jurisdictions). Since this final rule affects only agencies, departments, or instrumentalities of the United States, no regulatory flexibility analysis is required. Therefore, EPA certifies that the rule will not have significant economic impact on a substantial number of small entities.

C. Paperwork Reduction Act

This proposed rule only affects entities of the Federal Government. Therefore, the reporting and notification requirements contained in this rule are not subject to approval by the Office of Management and Budget (OMB) under provisions of the Paperwork Reduction Act of 1980, 44 U.S.C. 3501, *et seq.*

IV. References

(1) U.S. EPA. "Background Document for the Federal Real Property Transfer Regulations as Authorized by section 120(h) of the Comprehensive Environmental Response, Compensation, and Liability Act." U.S. EPA, OWPE, Washington, DC, 1987.

List of Subjects in 40 CFR Part 373

Federal facilities, Federal real property transfer, Environmental protection, Hazardous substances, Hazardous materials, Reporting and recordkeeping requirements, Superfund, Hazardous substance storage, release, and disposal.

Dated: April 6, 1990.

William K. Reilly,

Administrator.

Therefore, for the reasons set out in the preamble, chapter I of title 40 of the Code of Federal Regulations be amended as follows:

1. Part 373 is added to read as follows:

PART 373—REPORTING HAZARDOUS SUBSTANCE ACTIVITY WHEN SELLING OR TRANSFERRING FEDERAL REAL PROPERTY

Sec.

373.1 General requirement.
373.2 Applicability.
373.3 Content of notice.
373.4 Definitions.

Authority: Section 120(h) of the Comprehensive Environmental Response, Compensation, and Liability Act of 1980, as amended, 42 U.S.C. 9601 *et seq.*

§ 373.1 General requirement.

After the last day of the six month period beginning on April 16, 1990, whenever any department, agency, or instrumentality of the United States enters into any contract for the sale or other transfer of real property which is owned by the United States and at which, during the time the property was owned by the United States, any hazardous substance was stored for one year or more, known to have been released, or disposed of, the head of such department, agency, or instrumentality must include in such contract notice of the type and quantity of such hazardous substance and notice of the time at which such storage, release, or disposal took place, to the extent such information is available on the basis of a complete search of agency files.

§ 373.2 Applicability.

(a) Except as otherwise provided in this section, the notice required by 40 CFR 373.1 applies whenever the United States enters into any contract for the sale or other transfer of real property which is owned by the United States and on which any hazardous substance was stored for one year or more, known to have been released, or disposed of.

(b) The notice required by 40 CFR 373.1 for the storage for one year or more of hazardous substances applies only when hazardous substances are or have been stored in quantities greater than or equal to 1000 kilograms or the hazardous substance's CERCLA reportable quantity found at 40 CFR 302.4, whichever is greater. Hazardous substances that are also listed under 40 CFR 261.30 as acutely hazardous wastes, and that are stored for one year or more, are subject to the notice requirement when stored in quantities greater than or equal to one kilogram.

(c) The notice required by 40 CFR 373.1 for the known release of hazardous substances applies only when hazardous substances are or have been released in quantities greater than or equal to the substance's CERCLA reportable quantity found at 40 CFR 302.4.

§ 373.3 Content of notice.

The notice required by 40 CFR 373.1 must contain the following information:

(a) The name of the hazardous substance; the Chemical Abstracts Services Registry Number (CASRN) where applicable; the regulatory synonym for the hazardous substance, as listed in 40 CFR 302.4, where applicable; the RCRA hazardous waste number specified in 40 CFR 261.30, where applicable; the quantity in kilograms and pounds of the hazardous substance that has been stored for one year or more, or known to have been released, or disposed of, on the property, and the date(s) that such storage, release, or disposal took place.

(b) The following statement, prominently displayed: "The information contained in this notice is required under the authority of regulations promulgated under section 120(h) of the Comprehensive Environmental Response, Liability, and Compensation Act (CERCLA or "Superfund") 42 U.S.C. section 9620(h)."

§ 373.4 Definitions.

For the purposes of implementing this regulation, the following definitions apply:

(a) *Hazardous substances* means that group of substances defined as hazardous under CERCLA 101(14), and that appear at 40 CFR 302.4.

(b) *Storage* means the holding of hazardous substances for a temporary period, at the end of which the hazardous substance is either used, neutralized, disposed of, or stored elsewhere.

(c) *Release* is defined as specified by CERCLA 101(22).

(d) *Disposal* means the discharge, deposit, injection, dumping, spilling, leaking or placing of any hazardous substance into or on any land or water so that such hazardous substance or any constituent thereof may enter the environment or be emitted into the air or discharged into any waters, including groundwater.

[FR Doc. 90-8629 Filed 4-13-90; 8:45 am]

BILLING CODE 6560-50-M

Land and Natural Resources Division

ATTACHMENT B

Office of the Assistant Attorney General

Washington, D.C. 20530

May 16, 1990

MEMORANDUM

TO: Edward S. G. Dennis, Jr.
Assistant Attorney General
Criminal Division

FROM: Richard B. Stewart
Assistant Attorney General
Environment and Natural Resources Division

SUBJECT: Environmental Liability in Relation to Federal Property Ownership: New EPA Regulation

Attached is a comprehensive memorandum regarding new regulations which will affect federal agencies that own contaminated property and later sell or transfer it. As you know, concerns about such liability prompted former Acting Associate Attorney General Whitley to issue a letter which limits law enforcement forfeiture activities due to such liability.

The new EPA regulation should allow greater use of forfeiture without liability for contamination which was not caused by the agency which takes ownership.

After you review this memorandum, I propose discussing it with the Advisory Committee of United States Attorneys (at the upcoming meeting on May 21) as well as other appropriate components in order to help develop operational guidelines for law enforcement agencies, and determine the best way to communicate these guidelines. We have already been engaged in discussions with the Asset Forfeiture Office.

Please let Deputy Assistant Attorney General Barry Hartman or me know if you have questions or concerns.

cc: Barry H. Stern
Cary Copeland

Land and Natural Resources Division

Office of the Assistant Attorney General

Washington, D.C. 20530

May 16, 1990

MEMORANDUM

TO: Edward S. G. Dennis, Jr.
Assistant Attorney General
Criminal Division

FROM: Richard B. Stewart RBS/kwww
Assistant Attorney General
Environment and Natural Resources Division

SUBJECT: Environmental Liability in Relation to Federal Property Ownership: New EPA Regulation

SUMMARY

This is to advise you of a recent regulation promulgated by the Environmental Protection Agency (EPA) concerning the hazardous substance activity reporting requirements for federal agencies when selling or transferring federal real property. The regulation implements Section 120(h) of the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA or Superfund), 42 U.S.C. § 9620(h). The regulation should assist the law enforcement components in the Department in establishing procedures for seizure and forfeiture of property that may be contaminated with hazardous substances.

EPA's regulation governs the notice federal agencies must give when selling or transferring real property on which hazardous substances have been stored, released or disposed of. Federal agencies must include in the contract of sale or transfer notice of any hazardous substance which "during the time the property was owned by the United States" was "stored for one year or more, known to have been released, or disposed of." The notice must include the "type and quantity of such hazardous substance and notice of the time at which such storage, release, or disposal took place, to the extent such information is available on the basis of a complete search of agency files." 55 Fed. Reg. 14212 (April 16, 1990), to be codified at 42 C.F.R. § 373.1. Because the regulation focuses on hazardous substance

conditions which occurred during the federal ownership, federal law enforcement agencies will not bear the burden of concern over waste problems created by prior owners.

The regulation constitutes a government interpretation of Section 120(h), which establishes special conditions for federal agencies when they transfer property. Many agencies, including the Department, have been concerned over their exposure to clean up and other costs under the environmental laws, in particular CERCLA, when they obtain real property particularly as a result of forfeiture proceedings in connection with law enforcement activities. To assist the Department in both understanding this regulation, and assessing its potential liability for environmental contamination on real property, I am providing an additional explanation of the pertinent provisions of federal environmental law.

CERCLA BACKGROUND

Liability Scheme. CERCLA establishes both funding and authority for EPA to undertake clean up of hazardous substance sites, and also structures a liability scheme under which persons who fund clean up of hazardous substances may recover their costs. EPA's funds, known as the Superfund, are generally not available for response actions on federally owned property.1/ As a result, federal agencies must plan and budget for clean up of hazardous substances at their own property.

The heart of CERCLA rests in its liability scheme, found primarily in Section 107, which establishes classes of persons who may be liable for clean up costs. Liable parties include (1) owners and operators of facilities; (2) certain prior owners and operators; (3) generators, i.e., those who arrange for the disposal of waste; and (4) transporters of waste. 42 U.S.C. § 9607(a). Facility is a broadly defined term, including landfills, pits, buildings, vehicles, and "any site or area where a hazardous substance has been deposited, stored, disposed of, or placed, or otherwise come to be located." 42 U.S.C. § 9601(9). Consumer products in consumer use are excluded.

Liable parties may be held liable for the costs of removal or remedial actions, natural resource damages and health assessments, as each of these terms is used in CERCLA. 42 U.S.C. § 9607(a). Generally these costs are incurred by a federal or state governmental entity, which then seeks to recover from liable parties. CERCLA also permits actions for contribution

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1/ See Section 111(e)(3), 42 U.S.C. § 9611(e)(3), E.O. 12580 §§ 2(a), 2(e), 9(i). Short term or emergency responses, known as removal actions, may be undertaken by the Superfund at federally owned properties at the discretion of EPA.

among and between liable parties. 42 U.S.C. § 9613(f)(1). In such suits, the court is to "allocate response costs among liable parties using such equitable factors as the court deems are appropriate." Id.

Defenses Available. CERCLA recognizes few defenses. Under Section 107(b), the only defenses to liability require proof that the

> "release or threat of release of a hazardous substance and the damages resulting therefrom were caused solely by --
> (1) an act of God;
> (2) an act of war;
> (3) an act or omission of a third party other than an employee or agency of the defendant, or than one whose act or omission occurs in connection with a contractual relationship, existing directly or indirectly with the defendant. . ."

To invoke the CERCLA "third party" defense, the liable party must also demonstrate (1) exercise of "due care with respect to the hazardous substance concerned" and (2) taking of "precautions against foreseeable acts or omissions" of possible third parties. See 42 U.S.C. § 9607(b)(3).2/

Government "innocent landowner" defense. In 1986, when Congress amended CERCLA, it supplemented the third party defense to address the so-called innocent landowner. Concerned that the contracts for sale and transfer of property would put subsequent purchasers in a "contractual relationship" that would vitiate the availability of the third party defense, Congress added detailed definitional requirements to address such circumstances. Section 101(35) defines "contractual relationship" to include land transfer arrangements with specified limitations; a party meeting these limits is, notwithstanding the land transfer, eligible to invoke the third party defense.

The conditions established in Section 101(35) for the innocent landowner defense are as follows:

2/ Federal agency compliance with EPA's Section 120(h) property transfer regulations does not constitute a defense to liability for cost recovery under CERCLA. The liability regime governs when someone else may seek to hold a party liable for cleanup costs. The property transfer regulation, on the other hand, does effect the federal agencies' obligation to clean up property, since the pendency of suits or claims by third parties is irrelevant to Section 120 responsibilities.

- acquisition of the property "after the disposal or placement of the hazardous substance on, in, or at the facility," and;
- either:
    no knowledge of the hazardous substance, or

    "The defendant is a government entity which acquired the facility by escheat, or through any other involuntary transfer or acquisition, or through the exercise of eminent domain authority by purchase or condemnation" or

    acquisition of the property by inheritance or bequest, but;

    "if the defendant obtained actual knowledge of the release or threatened release of a hazardous substance at such facility when the defendant owned the real property and then subsequently transferred ownership of the property to another person without disclosing such knowledge" no defense under Section 107(b) will be available.

Together, Section 107(b)(3), with the definitions in Section 101(35), allows a government entity which acquires through involuntary means (this includes seizures and forfeitures, which are "involuntary" to the law enforcement violator) to invoke a defense from liability for hazardous substance contamination found on real property as a result of prior owner's activities if that federal agency (1) exercises due care once it owns the property, (2) secures the property from other third party actions, and (3) provides notice to any transferee of those hazardous substance conditions about which it knows.3/

Section 120 Obligations. In 1986, Congress expressed particular concern about the slow pace of clean up at major federal facilities. For the most part, the debate concerned large federal properties such as military bases and defense production facilities, nuclear and conventional. CERCLA had, since its enactment in 1980, included a waiver of sovereign

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3/ Steps necessary to meet these conditions will, of course, vary from site to site.

immunity, subjecting federal agencies to the requirements of the federal statute. However, compliance had been slow. Congress responded in 1986 with detailed provisions in Section 120, designed to assure that federal facility clean up was made subject to EPA oversight, and that federal agencies thoroughly inventoried and reported on hazardous substance practices in their operations.

The Section 120 obligations are organized around reporting of hazardous waste facilities and subsequent clean up schedules for those sites posing sufficient threat to warrant inclusion on EPA's National Priorities List. Thus Sections 120(b) and (c) require federal agencies to report to EPA, for maintenance on a Federal Agency Hazardous Waste Compliance Docket, facilities engaged in the storage, treatment or disposal of hazardous waste (see 42 U.S.C. § 3016); any information provided in permit applications or other reports required for the storage, treatment or disposal of hazardous wastes (see 42 U.S.C. §§ 3005, 3010)4/; and any information required to be reported when notice is given of a hazardous substance release (see 42 U.S.C. § 9603). From this information, EPA is to oversee the conduct of "preliminary assessments" of the federal properties, and evaluate such facilities to determine if they should be listed on the National Priority List. 42 U.S.C. § 9620(b), (c).

For federal facilities on the National Priority List, Section 120(e) provides a detailed arrangement for conduct of appropriate remedial investigations and feasibility studies (the RI/FS) necessary to select a remedy, and schedules for the conduct of such remedial actions as are found to be needed. 42 U.S.C. § 9620(e).

Section 120(j) allows the President to issue special orders exempting Department of Defense and Department of Energy facilities from any CERCLA requirements, if necessary to protect the national security interests of the United States. There are conditions on this authority, including notification to Congress and a limitation of one year, with the authorization to extend. 42 U.S.C. § 9620(j).

Section 120(h) Requirements. Section 120(h) addresses property transferred by Federal agencies. The section, which has been construed in EPA's recent regulations, provides in brief the following: Subsection (1) requires notice in the contract of sale or transfer of hazardous substances stored, released or disposed of at federally owned property; Subsection (2) requires EPA to promulgate regulations establishing the form of the notice

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4/ These basic reporting requirements are found in a companion statute, the Resource Recovery and Conservation Act, addressed briefly below.

required; Subsection (3) requires notice in any deed transferring federal property of the hazardous substances on the property and any remedial action taken. It also provides that such deed will include a covenant that necessary remedial action has been undertaken and that the United States will conduct any additional remedial action found to be necessary after the transfer of the property.

On its face, Section 120(h) might be read to impose onerous obligations on federal property owners, resulting in a situation where the United States would be perpetually responsible for hazardous substances found on any of its properties, without regard to how long the property was held or what government function was performed at the property. It appears from the legislative history of the 1986 amendments, however, that in Section 120 Congress was principally concerned with federal facilities engaged in waste generating practices. There is no indication that Congress intended law enforcement agencies, who come to own property temporarily and in the course of punishing violations of the law, to carry the burden and expense of perpetual clean up of such properties. As a result, EPA's regulation construes Section 120(h) to provide a more reasonable reading, consistent with legislative purpose.

The preamble to the regulation explains this interpretation:

> EPA believes that the concern of Congress in enacting section 120(h) was with federally owned facilities whose own operations might involve storage, disposal or release of hazardous substances. The types of facilities cited in Congressional discussion of section 120 included military bases, Department of Energy nuclear production facilities, and other civilian installations. Moreover, nothing in the text or legislative history of the statute suggests that Congress meant to require agencies which had not in some manner been responsible for the storage, release or disposal of hazardous substances to unilaterally assume the obligation in section 120(h)(3) of remedying the contamination prior to sale and warranting that contamination that came to light after sale would also be corrected. In addition, section 120(h)(1) requires the notice to contain information about the type and quantity of hazardous substance stored, released, or disposed of, and the time at which such storage, release or disposal took place. It is unlikely that the agency would

> be expected to have such detailed information with respect to an activity which took place before the agency held the property.
>
> Therefore, it is EPA's belief, in light of the overall statutory scheme, that section 120(h)(1) was meant to apply where the storage, release, or disposal referred to in the statute occurred during the time the property was owned by the Federal government.

55 Fed. Reg. 14210. Consistent with this interpretation, EPA's regulation requires:

> . . . whenever any department, agency, or instrumentality of the United States enters into any contract for the sale or other transfer of real property which is **owned by the United States and at which, during the time the property was owned by the United States,** any hazardous substance was stored for one year or more, known to have been released, or disposed of, the head of such department, agency, or instrumentality must include in such contract notice of the type and quantity of such hazardous substance and notice of the time at which such storage, release, or disposal took place, to the extent such information is available on the basis of a complete search of agency files.

55 Fed. Reg. 14212 (emphasis added).

The regulation does not directly address the Section 120(h)(3) deed and covenant requirement. Although it could be argued that subsection (h)(3) should be read more broadly than subsection (h)(1),5/ we believe that it should be read in

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5/ The deed must provide information about the nature of hazardous substance activity, "to the extent such information is available on the basis of a complete search of agency files." The covenant is to warrant that "(i) all remedial action necessary to protect human health and the environment with respect to any such substance remaining on the property has been taken before the date of such transfer" and that any additional remedial action found to be necessary will be conducted by the United States. See 42 U.S.C. § 9620(h)(3)(A), (B). Since Congress again tied the federal agency's obligations to a search of its own files, using language parallel to subsection (h)(1), it is logical that the obligation to clean up and warrant the

(continued...)

consonance with subsection (h)(1). As a result, the obligation to include information in the deed, including warranties with regard to clean up, will cover only those hazardous substance activities which are subject to the notice requirement of Section 120(h)(1). On the same reasoning which supports not requiring agencies to give Section 120 (h)(1) notice of events which did not occur during their ownership, the statute does not support requiring the agencies to provide warranties for hazardous waste activities which did not occur during their ownership.

Relationship of CERCLA Notice Requirements. Although EPA's regulation limits the burden of notice required of federal agencies under Section 120(h), federal agencies must take care to assure that they can invoke the so-called "innocent landowner" defense described above. In order to do so, notice of known hazardous substance activities on federal properties must be provided prior to sale or transfer. We recommend that Departmental components establish routine practices of assembling sufficient information to give notice to prospective purchasers of those hazardous substance activities which the agency knows have occurred on the property, even where our information reflects that the hazardous substances were stored, released or disposed of prior to governmental ownership. Even though the EPA Section 120(h) regulation might permit an agency to give notice of solely those hazardous substance activities which occur during governmental ownership, Section 107(b), as clarified by Section 101(35) mandates that the governmental entity who seeks to invoke an "innocent landowner" defense must provide notice to purchasers of known hazardous substance activities. For Section 120(h) disclosure, practices during federal ownership are sufficient; to

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5/ (...continued)
clean up applies to the same property as the obligation to give notice. A broader reading would make the United States perpetually the guarantor of the environmental health of any property that ever enters government inventories, even if the agency had no knowledge of the conditions and no obligation to provide notice. It is more likely that Congress intended governmental responsibility under subsection 120(h)(3) to cover the same property as the notice requirements of subsection 120(h)(1).

This reading also makes sense since Section 120(h) does not exculpate federal agencies from CERCLA liability parties under Section 107(a) even where it does not have a notice or covenant responsibility under Section 120(h), although those circumstances should be rare. Thus, in the event an agency provides notice and covenants based on a complete search of its files, but additional information demonstrates other hazardous substances for which the agency is a responsible party, the agency may bear liability for cleanup costs incurred.

qualify for the defense, however, any information about activities prior to federal ownership should also be disclosed.6/

In sum, while CERCLA Section 120 addresses supplemental responsibilities for federal agencies, governmental entities must also observe their obligations under other sections of CERCLA. Departmental components should take the steps necessary to assure that they can invoke the one defense from liability which Congress made specifically available to the governmental property acquirer.7/

RCRA BACKGROUND

While the primary purpose of this memorandum is to advise you of requirements under CERCLA, federal agencies handling hazardous substances also need to be familiar with the companion statute, the Resource Conservation and Recovery Act (RCRA), 42 U.S.C. §§ 6901 - 6992. RCRA is designed generally to manage ongoing activities involving handling of solid and hazardous waste. A few provisions are pertinent to this memorandum's discussion of CERCLA. Broadly, while the CERCLA provisions addressed herein concerned federal real property, RCRA concerns itself with the personal property--the hazardous substances, containers, equipment or other materials.8/

6/ For example, property used as a drug lab may be seized with certain hazardous chemicals on site, which law enforcement officers will dispose of properly. Information obtained from witnesses or informants may address where other drugs were processed, where wastes or bad batches were dumped or other information about contamination at the site. The information concerning what we do with hazardous substances during our ownership is pertinent to the Section 120(h) requirements. The information concerning previous disposals is pertinent to invoking the "innocent landowner" defense and should be disclosed for that reason only.

7/ As addressed above, CERCLA subjects federal agencies to potential suit from any party who incurs costs as a result of cleaning up hazardous substance contamination. Federal agency compliance with Section 120(h) is not a defense to claims by these governmental or private entities that they have spent money to clean up contamination resulting from governmental property or activities. Rather, allegations of non-compliance with the Section 120(h) obligations would provide a different cause of action against the federal agency, likely arising under the "citizen's suit" provision, 42 U.S.C. § 9659(a)(1).

8/ Under RCRA, sovereign immunity has been waived to state and local regulation of solid and hazardous waste. Federal agencies (continued...)

Where federal agencies have hazardous waste on their property, they will generally have to comply with RCRA in the handling and disposal of that waste. RCRA governs storage, treatment and disposal of hazardous waste, requiring entities who conduct such activities to have permits. All persons must assure that hazardous waste is stored, treated or disposed of at permitted RCRA facilities. For Department components taking property in the course of law enforcement efforts, this will generally mean securing and disposing of any hazardous waste in accordance with RCRA, usually by contracting for transport and disposal in a permitted facility. Without going through all of the details of RCRA regulation, it is important to note that storage of most hazardous wastes at a location for longer than 90 days requires that the facility be permitted as a storage facility. As you review Departmental practices, please assure that waste materials are being handled lawfully and are not maintained or disposed of at unpermitted facilities.

You should also be aware that federal agencies engaging in hazardous waste activities may be required to give notice of those activities to EPA. As summarized above, RCRA Section 3016 requires federal agencies to maintain an inventory of sites at which hazardous wastes are stored, treated or disposed. 42 U.S.C. § 6937. Under these requirements, for example, a federal entity which takes real property on which hazardous waste has been stored could, after the passage of time, itself become responsible for a RCRA storage facility, and have to give notice to EPA.

CONCLUSION

Department components involved with property on which hazardous substances are found must consider the potential responsibility under federal environmental laws outlined in this memorandum. The recent EPA Federal Property Transfer Regulations reflect an effort to reduce the burden that CERCLA places on law enforcement agencies. As there are a multitude of specific circumstances in which the statutes and regulations are applied, we are happy to continue to work with the Department components in applying these laws.

Attachments

8/ (...continued)
must therefore comply not only with federal law, but with state and local law as well. See 42 U.S.C. § 6961.

NOTICE, COVENANT and WARRANTY

NOTICE [For Contract of Sale and for Deed]

This notice provides information concerning hazardous substances known or believed to have been stored, released or disposed of at [provide common identification of the property, such as a site name or street address; followed by a proper legal description]. The United States of America owned the described property as a result of deed ____[dated; record book entry]____. The ___[name of agency(s)]__ has (have) provided the information contained herein for the time period(s) indicated based on a complete search of agency files.

This notice is to be recorded with the deed transferring title of this property to _____ pursuant to a contract or option dated __[fill in date]__.

A. Hazardous Substances Known to have been Released, Disposed of or Stored during United States Ownership

Information provided in this part addresses the period from __[date of deed]__ to ___[date of sale]__ , [being the period when the [name of agency] had administrative jurisdiction over the subject land, or being the entire period in which title was vested in the United States,] based on a complete search of agency files. [repeat for other agency(s) if needed]

1. **Identify any hazardous substances removed from the site for disposal.** _____

_____

[e.g., provide information from, summarize or attach manifests identifying any hazardous substances disposed of from site by United States or other notification of hazardous substances provided to federal, state or local agency.]

2. **Identify any hazardous waste storage, treatment or disposal units on the site.** _____

_____

[e.g., provide information from, summarize or attach any permit or permit application or other notice provided by U.S. Environmental Protection Agency or state or local agency with responsibility for hazardous substances.]

3. **Identify any other information concerning hazardous substances stored, disposed or released on the property** _____

_____

_____

[e.g., summarize any information concerning hazardous substance activity reported by witnesses.]

4. **Where property was used, in whole or in part, for, or potentially affected by, continuing operations which generate**

hazardous substances, identify all such operations and substances _____ [e.g., for property on which hazardous substances were in use during United States ownership, provide information from, attach or summarize any permits, notifications, reports or documentation concerning hazardous substances prepared, filed or submitted during the time of United States ownership. Include such documentation whether prepared by the United States, its agencies, or private tenants, residents or occupants on the real property.]

B. Actual Knowledge of Hazardous Substances at Property, without regard to United States Ownership

Information in this part addresses hazardous substances which may have been stored, released or disposed of prior to United States ownership. To the extent possible, this notification also describes the source of the information. The United States cannot assure that information based on reports by other persons, indirect evidence or other sources is accurate in all respects.

1. **Describe any known instances of authorized or permitted storage, disposal or release of hazardous substances at the property** _____ [e.g., provide information from, attach or summarize any permits, notifications, reports or documentation concerning hazardous substances issued to prior owners or prior operators and located at property]

2. **Describe any known instances of unauthorized or unpermitted storage, disposal or release of hazardous substances at the property** _____ [e.g., indirect evidence from conditions at site, reports from informants, witnesses, evidence from state or local regulatory entities.]

C. Definitions

1. "Hazardous substances" has the meaning provided in 42 U.S.C. § 101(14) and 40 C.F.R. §§ 300.6 and 302.4 and thus includes all hazardous wastes identified and listed pursuant to 40 C.F.R. part 261.

2. Descriptions of hazardous substances shall include, to the extent such information is known and is appropriate, the common name, the chemical abstracts name, the chemical abstracts number and the EPA hazardous waste number, or other information

sufficient to describe the substance. Material safety data sheets should be provided to prospective buyers.

3. "Disposal" and "storage" shall have the meanings set forth in 42 U.S.C. §§ 6903(3), (33) and regulations promulgated thereunder. "Release" shall have the meaning set forth in 42 U.S.C. § 9601(22) and regulations promulgated thereunder.

COVENANT and WARRANTY [for Deed]

The United States hereby covenants and warrants that--

(i) all remedial action necessary to protect human health and the environment with respect to any such substance identified in part A of this Notice remaining on the property has been taken before the date of such transfer, and

(ii) any additional remedial action found to be necessary with respect to any such substance identified in part A of this Notice after the date of such transfer shall be conducted by the United States.

EXHIBIT
D

CHARGING MULTIPLE § 924(c)(1) COUNTS

An examination of the relevant case law suggests that, as a general rule, there must be a separate underlying or predicate offense -- be it a conspiracy or a substantive offense -- for each § 924(c)(1) count in an indictment. United States v. Chalan, 812 F.2d 1302 (10th Cir. 1987) (one of the two § 924(c)(1) convictions vacated because the two underlying offenses charged in the indictment constituted a single offense for double jeopardy purposes), cert. denied, 109 S.Ct. 534 (1988); United States v. Rawlings, 821 F.2d 1543 (11th Cir. 1987) (two separate underlying offenses of bank robbery supported two § 924(c)(1) counts in indictment); United States v. Torres, 862 F.2d 1025 (3d Cir. 1988) (separate underlying offenses of conspiracy to distribute cocaine, and assault, supported two § 924(c)(1) counts in indictment); United States v. Henry, 878 F.2d 937 (6th Cir. 1989) (one of the two § 924(c)(1) convictions vacated because of an improperly drafted indictment, but separate underlying offenses of manufacturing a controlled substance and possession with intent to distribute could support two § 924(c)(1) counts in indictment).

Despite this general rule, the Criminal Division has argued that in certain circumstances a single underlying conspiracy count may support multiple § 924(c)(1) counts in an indictment. Recently the United States Court of Appeals for the Eleventh Circuit affirmed -- unfortunately without opinion -- the multiple § 924(c)(1) convictions of one Schwark. The evidence presented at trial showed that Schwark was a member of a drug trafficking conspiracy that began in 1985 and ended in 1988; the evidence also showed that Schwark, while going about the business of distributing cocaine, used three identifiably different firearms during three identifiably different transactions at different times during the lengthy conspiracy. As the Criminal Division stated in its brief "there is no good reason to suppose that Congress intended that a defendant who creates multiple and separate independent harms with different weapons on temporally distinct occasions should be punished with only a single § 924(c)(1) sentence merely because those multiple separate harms were created within the context of a single protracted drug trafficking conspiracy."

EXHIBIT E

CIVIL FORFEITURE ISSUES AND THE RIGHT TO FINANCIAL PRIVACY

I. Mortgage Rights of Financial Institutions

A. What is forfeitable

1. Drug proceeds, and any property, real or personal, purchased with drug proceeds. 21 USC 881(a)(6); 21 USC 853(a)(1). (Examples: the cash seized from the drug dealer; the house the dealer bought with his drug profits.)

2. Real property used to facilitate a drug offense. 21 USC 881(a)(7); 21 USC 853(a)(2). (Examples: the house the drug dealer used as his base of operations.)

3. Conveyances used to transport drugs or facilitate the transportation, sale or possession of drugs. 21 USC 881(a)(4). (Examples: the airplane used to import the drugs; the car driven by the purchaser to the scene of the drug sale.)

4. Any property, real or personal, "involved" in a money laundering offense, and any property purchased with such property. 18 USC 981(a)(1)(A); 18 USC 982(a)(1).

   a. The actual money being laundered. (Example: the million dollars wired by a South American drug dealer to an account in Miami; the proceeds of a stock swindle being wired to Switzerland.)

   b. Property used to facilitate the laundering. Example: the real property exchanged for cash as part of a money laundering scheme.)

   c. Property purchased with previously laundered money. (Example: the house purchased with the million dollars wired into the Miami account by the South American drug dealer.)

5. Any property, real or personal, purchased with proceeds of a <u>foreign</u> drug offense, 18 USC 981(a)(1)(B).

6. Proceeds of a crime involving bank fraud, 18 USC 981(a)(1)(C); 18 USC 982(a)(2).

B. Forfeiture in Criminal Cases

1. In a criminal case, forfeiture is used as an alternative means of punishing the criminal. Any property the criminal has at the time of sentencing is subject to forfeiture if it falls within one of the categories described above. 18 USC 982; 21 USC 853.

2. If the criminal no longer has the property in question, the court can order him to forfeit something else of equal value, even if this substitute property was not involved in the crime. 21 USC 853(p). (See discussion of "substitute assets" below.)

3. It is clear, however, that the government is entitled to punish only the criminal defendant and may not deprive any third party of a lawfully acquired interest in the property. 18 USC 853(n). (See discussion of "innocent owners" below)

C. Forfeiture in Civil Cases

1. Forfeiture in a civil action, however, is a little more complicated. No one has been convicted of anything necessarily; the government isn't out to punish anyone; it is simply out to take possession of property that now belongs to the government because it was used to commit a crime.

2. This is because, under the "relation back doctrine", title to property passes to the government at the time the illegal act giving rise to forfeiture occurs. 18 USC 981(f); 21 USC 881(h). United States v. $5,644,540 in U.S. Currency, 799 F.2d 1357 (9th Cir. 1986).

3. Thus in a civil case, where it is the property itself that is being sued, it doesn't matter that the present owner of the property is not the one who committed the illegal act. What matters is that the property itself was involved in the act giving rise to forfeiture.

4. Therefore property may be subject to forfeiture even if by the time the seizure occurs it has passed to persons other than the original wrongdoer, and even if third parties, such as lienholders, have subsequently acquired an interest in the property. This is because the wrongdoer lost his title to the property at the time the criminal offense was committed, and therefore had no title to pass on to any other person. See In Re One 1985 Nissan, 889 F.2d 1317 (4th Cir. 1989).

D. Innocent Owners and Lienholders

1. But innocent owners and lienholders of property are protected. 18 USC 981(a)(2); 21 USC 881(a)(4),(6),(7); 21 USC 853(n).

2. Property may not be forfeited from someone who had a pre-existing interest in the property and who was unaware that his property was being used illegally. This is true in both civil and criminal cases.

3. In criminal cases, it is also true that the court may not enter a forfeiture order that deprives a wholly innocent person of a subsequently acquired interest.

4. Because of the "relation back doctrine", however, it not clear to what extent persons who acquire their interest after title has passed to the government are protected. See In re: One 1985 Nissan, 300ZX, 889 F.2d 1317, 1321 nn. 4 & 5 (4th Cir. 1989) (heirs do not take title to property where title has passed to the government prior to the wrongdoer's death). But it is highly likely that the courts will craft some protection for the bona fide purchaser who was unaware that he was purchasing tainted property.

5. Similarly, like the lienholder whose lien precedes the illegal use and who remains unaware of the criminal activity, a lienholder who subsequently acquires a lien without knowledge of the illegal use of the property is probably protected to the same extent as the bona fide purchaser. See United States v. One Single Family Residence Located at 6960 Miraflores Ave., No. 88-0349-CIV-Scott (S.D. Fla. February 21, 1990).

E. Examples

1. A drug dealer is the sole owner of a ranch that he purchased with drug proceeds. The government seeks forfeiture of the ranch as part of the criminal sentence. Does the government get the ranch? Yes.

2. Suppose the defendant holds the ranch jointly with 2 innocent partners? Does the government get the ranch? The government gets only the defendant's one-third interest, and the 2 partners have a new partner, Uncle Sam.

3. Suppose the drug dealer held the ranch jointly with his innocent wife as tenants by the entirety. Is the property divided between the government and the wife? No. The wife's interest is in the whole property and is indivisible, but the government may put a lien on the property and take the defendant's share should the property ever be divided by divorce, death of the wife, or some other event. United States v. One Single Family Residence, 894 F.2d 1511 (11th Cir. 1990).

4. Suppose the drug dealer bought the ranch subject to a mortgage? The government gets the equity in the ranch, but must sell it to pay off the mortgage held by the innocent lienholder.

5. A drug dealer uses his girlfriend's car to transport drugs. In a civil case the government seeks forfeiture of the car from the girlfriend. Does the government get the car? No, as long as the girlfriend was innocent.

6. Suppose the drug dealer uses his own car to transport the drugs and subsequently gives the car to his innocent girlfriend. Can the government forfeit the car from the girlfriend? Yes. Under the relation back doctrine the government had title to the car from the moment the criminal offense occurred, and the drug dealer had no title to pass on to the girlfriend.

7. Suppose the drug dealer used his own car but a lender had a pre-existing lien on the car to cover the original auto loan? Can the government take the car? Yes, but it must sell it to pay off the lien.

8. Suppose the drug dealer, after using the car to commit the drug offense, sells it to an innocent purchaser through a newspaper ad, or uses the car as collateral on a loan from an innocent lender. Does the government get the car? Not clear. Under the relation back doctrine, the drug dealer had no title to pass on to either the purchaser or lender, but it would be unfair to deprive a bona fide purchaser for value of his property without compensation.

F. Extent of Protection of an Innocent Lienholder

1. Early cases held that while an innocent lienholder whose lien preceded the illegal act was protected, the protection only extended to the amount of the lien, not to any interest owned. See United States v. One Piece of Real Estate, 571 F. Supp. 723 (W.D. Tex. 1983).

2. Under those cases, if the government forfeited real property subject to a mortgage, and the mortgagee was wholly innocent of the act giving rise to forfeiture, the government was limited to forfeiture of the wrongdoer's equity in the property, and had to pay off the mortgagee's interest, but the government did not have to pay any interest on the mortgage that had accrued since the time the property was seized. The theory was that the government did not have to do anything that would diminish the value of its interest in the property.

3. More recently, several courts have decided that that rule in effect gave the government an interest-free loan from the time of the seizure until the property was sold. Since the government is entitled to take only the equity held by the wrongdoer, it takes the equity subject to the same obligation the wrongdoer had to pay interest on the mortgage until the principal is paid off. Therefore, when the government seizes real property, it is obligated to pay the mortgagee both the principal and the accrued mortgage interest once the property is disposed of. See In Re Metmor Financial, Inc., 819 F.2d 446 (4th Cir. 1987).

4. But even these more liberal courts are divided as to whether the government's obligation goes any further. Does the government have to pay the costs and attorneys fees incurred by the lienholder in establishing its interest in the property? Some courts say "no", because these are not part of the lienholder's interest in the property; they are only costs associated with protecting its interests. Others say costs and fees must be paid if the original mortgage agreement provided for them in the event of litigation. Compare United States v. Property Known as 708-710 W. 9th Street, 715 F. Supp. 1323 (W.D. Pa. 1989) with United States v. Parcel of Land and Building Thereon at 20 Debrah Lane, 1990 U.S. Dist. LEXIS 627, No. 88-1427-Wf, (D. Mass. January 17, 1990).

5. Does the government have to turn over any rent received on the property to the lienholder, or allow the lienholder to proceed to foreclosure, if the original mortgage agreement provided that remedy. Again, some courts hold that the government is required to honor the lienholder's property interest, but not his contractual rights under the mortgage contract with the wrongdoer, while other courts would honor the contract. Compare United States v. Property Known as 708-710 W. 9th Street, 715 F. Supp. 1323 (W.D. Pa. 1989) with Monroe Savings Bank v. Catalano, 733 F. Supp. 595 (E.D.N.Y. 1990).

6. The regulations pertaining to remission or mitigation of forfeiture provide that a lienholder may recover "net equity", which includes principal and unpaid interest from the date of seizure, but not costs and attorneys fees. See 28 CFR 9.2

G. Who is an innocent owner?

1. All of the above assumed that the lienholder was an "innocent owner".

2. The burden is on the lienholder, or other party asserting an interest in the property, to prove his innocence. United States v. 1980 Red Ferrari, 827 F.2d 477 (9th Cir. 1987).

3. The burden is to prove three things: you had no knowledge of the illegal act; you did not consent to the illegal act; and you were not willfully blind to the illegal act. United States v. One Parcel of Land, Known as Lot 111-B, No. 89-15409, (9th Cir. May 10, 1990).

4. Thus in the above examples, the girlfriend who allowed her car to be used by the drug dealer, knowing that he was using it to deal drugs, would lose the car. See Red Ferrari, supra. The wife who knew her husband was dealing drugs out of their house would lose her interest in the house. See United States v. One 197.9 Acre Parcel of Land, No. 89-5358 (3rd Cir. March 20, 1990). Even an attorney who is assigned the deed to a house or title to a car in payment of his fee would lose his right to the property if he knew of its connection to his client's crime. See Caplin & Drysdale v. United States, 109 S. Ct. 2646 (1989).

5. A person who is "on notice" that property is subject to forfeiture and proceeds to acquire an interest is, unlike the person merely responding to a newspaper ad, not a bona fide purchaser. See Red Ferrari, supra (person buying car from girlfriend who acquired it from drug dealer is not innocent).

6. You also must exercise "due care" to make sure you are not acquiring an interest in forfeitable property. Failure to exercise due care precludes reliance on the innocent owner defense. United States v. $215,300 in U.S. Currency, 882 F.2d 417, 420 (9th Cir. 1989).

H. Banks as Innocent Owners

1. What does all of this mean to banks and other lienholders that would assert an innocent owner defense to forfeiture?

2. Miraflores Ave.: drug dealer buys $1.2 million house for cash, then goes to bank and asks for $800,000 mortgage loan. Bank gives loan, sending $800,000 to borrower's Swiss bank account. Government comes to forfeit house. Bank asserts its mortgage interest.

3. Government first argues that even if the bank is wholly innocent, its interest is not protected because it was acquired after the house became forfeitable. (See discussion of relation back doctrine, above.) Court rejects this arguments: innocent lienholders are protected even if interest is subsequently acquired.

4. Question then is whether the bank met its burden of proving its innocence. Court found the following:

   -- the bank knew that the borrower was a Panamanian shell corporation and that the house was its only asset;

   -- the bank did not ask the purpose of the loan or how it would be repaid;

   -- the bank failed to do a title search on the property;

   -- the bank transferred the proceeds of the loan to a Swiss bank account;

   -- the loan was processed outside of normal channels;

   -- a portion of the proceeds of the loan were used to buy expensive gifts for the bank president

5. On this record, the court found that the bank had not proven its innocence. The bank, the court said, "had closed its eyes to what it had every reason to know was the truth." The court continued, "Drug proceeds are not a permissible source of business for the financial community. Those who knowingly do business with drug dealers do so at their own risk." Finally, the court concluded, "Nothing in the ... history of the forfeiture statute gives ... banks any special insulation from vulnerability to forfeiture of assets traceable to drug proceeds. On the contrary, Congressional concern with money laundering points in precisely the opposite direction." Therefore the bank lost its interest in the seized residence.

II. Substitute Assets

A. When can you get substitute assets?

1. As mentioned, the purpose of forfeiture in a criminal case is to punish the defendant by taking his property. This may be imposed as an alternative to, or in addition to, a fine and/or a jail sentence.

2. A defendant may not escape this form of punishment by simply getting rid of the asset. If the asset can't be found, has been transferred to a third party, has been moved outside of the U.S., or has been reduced in value, substitute property of equal value may be forfeited.

3. This has been the law in drug cases since 1986, and money laundering cases since 1988.

B. Examples in money laundering cases.

1. In 1988, Congress changed the money laundering statute to make the actual money being laundered forfeitable.

2. For example, if A, a professional money launderer, takes $1 million from B, a drug dealer, and washes it through A's bank account or through a company A owns and returns it B, the money becomes forfeitable. 18 USC 982(a)(1).

3. If B is convicted of money laundering, the $1 million may be forfeited from B; and if B no longer has the money, substitute property may be forfeited.

4. Similarly, if A is convicted of money laundering, the $1 million may be forfeited from A; and since he no longer has the money, substitute property may be forfeited.

5. If A is an individual, he may not have any substitute property worth forfeiting. But if A is a large business, or even a bank that knowingly cooperated in the money laundering scheme and was convicted, then A could be required to forfeit an amount equal to all of the money laundered through the bank, and this forfeiture would come out of the bank's other assets in substitution for the money that could no longer be found.

C. Substitute assets limited to defendant's equity

1. In the case of real or personal property, such as a house or a car, that is subject to forfeiture in a criminal case, the amount forfeited in the form of substitute assets may not exceed the equity that defendant had in the property at the time he owned it.

2. Thus if the defendant uses an $18,000 truck to commit a drug offense, but only has $10,000 equity in the truck (the rest being owed to a lienholder), and he sells the truck before he is convicted, the amount subject to forfeiture in substitute assets is $10,000, not $18,000. See United States v. Roberson, No. 89-8016 (11th Cir. April 2, 1990).

3. This makes sense, since if the forfeiture had occurred while the defendant still owned the truck, and the truck itself had been forfeited, the government would have had to pay off the auto loan to the innocent lienholder and received only the net equity the defendant had had in the truck.

D. Civil cases

1. There are no substitute asset provisions for civil cases.

2. As mentioned, in a civil case, no one has been convicted if a crime necessarily, and no one is being punished. The government is simply taking possession of property that became contraband when it was involved in a criminal offense.

3. It wouldn't make any sense to substitute clean assets for dirty ones when the theory is simply to recover contraband.

4. But this causes a problem in the case of bank accounts. If we're talking about a car or a boat that was involved in a crime, it's easy to identify the thing subject to forfeiture. But how can you tell which money in a bank account is the dirty money, and which money is clean money that has been commingled.

5. Requests banks receive from investigators in civil cases for bank records are often sought for the purpose of tracing dirty money through an account to see what is forfeitable and what is not. (Incomplete and illegible records make this process very difficult.)

6. A clever money launderer, of course, will cycle money in and out of his account rapidly, so that the balance frequently falls to zero, or close to it, making it impossible for the government to establish that any of the money in the account at a given time is traceable back to dirty money that was deposited on an earlier occasion. See United States v. Banco Cafetero Panama, 797 F.2d 1154 (2nd Cir. 1986).

7. We are seeking new legislation to address this problem; but in the mean time, bankers will have to be prepared to produce all of the voluminous records necessary to allow government to complete this tracing analysis.

III. Right to Financial Privacy Act

A. Disclosure of Records by Government Agencies

1. In 1988, Congress amended the RFPA to permit government agencies that had obtained certain financial records in the exercise of their supervisory or regulatory function to turn those records over to the Attorney General for criminal investigative or prosecutive purposes without complying with the notification requirements of the RFPA. 12 USC 3412(f).

2. The limitations in this provision are causing problems and further amendments are likely.

3. First, why only the AG? Shouldn't it be permissible to turn the records over to the IRS or other Treasury agency to carry out criminal money laundering investigations? See S.2652, §7305 amending 12 USC 3413.

4. Second, if records of an incriminating wire transfer are in the possession of the Federal Reserve because the Federal Reserve Bank in Atlanta served as a link in the transfer from a bank in Panama to a bank in New York, can the FRB turn the records over to the AG under 3412(f)? Or is the FRB precluded from doing so because the reason for its having the records are unrelated to its "supervisory or regulatory function"?

5. Third, is the limitation to "criminal investigations" necessary? If the government sets up a new agency to study and analyze wire transfers (FinCEN), but not to do criminal investigations per se, does 3412(f) permit transfers of records? (See S.2652, §7302)

B. Refusal to Do Business

1. In 1986, the RFPA was amended to protect banks from suits filed by bank customers when the bank voluntarily discloses to the government that the customer may be engaging in criminal activity. 12 USC 3403(c).

2. This provision protects the bank from a suit based on the disclosure itself, or the bank's failure to notify the customer of the disclosure.

3. But what is the bank supposed to do after making the disclosure? Should it continue to do business with the customer (and risk being implicated in a criminal prosecution), or should it drop the customer and risk a lawsuit if it turns out that it was mistaken about the criminal activity and dropping the customer causes damages to the customer's business activity?

4. Congress is currently considering an amendment to §3403(c) that would protect banks from such civil suits, and thereby encourage further voluntary disclosures of suspected criminal activity. See S.1972, §1408.

C. Crimes Against Financial Institutions by Insiders

1. In 1988, Congress amended the RFPA to permit disclosure of financial records of "insiders" (officers, employees, controlling shareholders, major borrowers) to the government if there is reason to believe that the records are relevant to the commission of a crime against the financial institution itself, or to a money laundering offense. See 12 USC 3413(l).

2. A pending amendment would broaden the list of money laundering offenses that would trigger this provision. See S.1972, §1404.

Guideline Sentencing Update

Guideline Sentencing Update will be distributed periodically by the Center to inform judges and other judicial personnel of selected federal court decisions on the sentencing reform legislation of 1984 and 1987 and the Sentencing Guidelines. Although the publication may refer to the Sentencing Guidelines and policy statements of the U.S. Sentencing Commission in the context of reporting case holdings, it is not intended to report Sentencing Commission policies or activities. Readers should refer to the Guidelines, policy statements, commentary, and other materials issued by the Sentencing Commission for such information.

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Departures

AGGRAVATING CIRCUMSTANCES

Ninth Circuit holds upward departure to equalize sentence with that of codefendant is not permissible; also holds type and number of weapons are invalid grounds for upward departure in U.S.S.G. § 2K2.1 offense. Defendant pled guilty to one count of aiding and abetting in providing false statements in firearms acquisition, and was sentenced under. § 2K2.1. The district court departed from the guideline range of 4–10 months to impose a two-year term.

The departure was partly based on the two-year sentence given to a codefendant. In reversing, the appellate court noted that the codefendant had confessed to another offense, and thus had not pled guilty to the same crime as defendant, and that defendant had negotiated a more favorable plea agreement. The court found it may be appropriate in some cases to look behind the plea agreement to assess the actual culpability of a defendant, but "there are two other important principles that must also be considered. . . . Plea bargaining is a critical tool in the criminal justice system. . . . Were courts to base sentencing process to lose its effectiveness as ... ignoring the benefits of the plea bargain to ... are entitled, the consequences for both the ... and ... justice systems might well be disastrous."

The court also found such a departure "would seriously frustrate" the Guidelines scheme and goal of limiting judicial discretion: "Judges would be able to determine a defendant's sentence not just on the basis of what the Guidelines provide with respect to his conduct but also on what they provide with respect to the conduct of any of his co-defendants. There is little indication in the Guidelines that the Commission contemplated so expansive an approach. . . . In short, an upward departure for purposes of equalization is not permissible."

The court also found that upward departure based on the type and number of weapons—46 AK-47 rifles and 2 other rifles—was not permitted under the Guidelines. The court held that the Sentencing Commission had adequately considered and rejected both circumstances in determining a sentence under § 2K2.1. *Cf. U.S. v. Uca*, 867 F.2d 783 (3d Cir. 1989) (upward departure based on number of guns improper for defendant sentenced under U.S.S.G. § 2K2.3 (1987)).

The district court had also based its departure on the ground that defendant committed the offense "for no other reason than to satisfy his greed." The appellate court found that "profit is a primary motivating factor in many if not most types of crimes," and thus greed is not an unusual or extraordinary circumstance that warrants departure.

U.S. v. Enriquez-Munoz, No. 89-10256 (9th Cir. June 28, 1990) (Reinhardt, J.).

MITIGATING CIRCUMSTANCES

U.S. v. Morales, No. 89-1210 (2d Cir. May 30, 1990) (Cardamone, J.) (personal characteristics of defendant that made him "particularly vulnerable to in-prison victimization"—namely his "diminutive size, immature appearance and bisexual orientation"—were proper grounds for departure to the statutory minimum because "it is plain that the Commission did not consider vulnerability to the extent revealed in this record—where the only means for prison officials to protect [defendant] was to place him in solitary confinement"; also, sentencing court did not improperly rely on factors in U.S.S.G. § 5H1.1, p.s., that should not ordinarily be used as grounds for departure).

CRIMINAL HISTORY

U.S. v. Russell, No. 89-6142 (10th Cir. June 20, 1990) (Seth, Sr. J.) (holding that in determining reasonableness of extent of departures above criminal history category VI, "we should afford the trial judge due deference and not 'lightly overturn determinations of the appropriate degree of departure'"; court declined to impose any sort of formula for computing such departures, finding that the Sentencing Commission "would have provided such a formula had one been intended"). *See also U.S. v. Bernhardt*, No. 89-6323 (10th Cir. June 11, 1990) (McKay, J.) ("Because the Sentencing Commission has provided no guidance for determining the reasonableness of upward departures from category VI, we must simply use our own judgment as to whether the sentence imposed is proportional to the crime committed, in light of the past criminal history."). *Cf. U.S. v. Schmude*, 901 F.2d 555 (7th Cir. 1990) (suggesting increases in 10–15% increments if category VI is inadequate).

U.S. v. Gardner, No. 89-6289 (10th Cir. June 18, 1990) (Ebel, J.) (affirming departure to lower end of career offender range because criminal history category VI underrepresented defendant's criminal history—although defendant was not a "career offender" because a second violent felony was too old to be counted, his "criminal history closely resembled that of a career offender and the district court's decision to sentence defendant by reference to the career offender provisions was reasonable, particularly where, as here, the district court chose to sentence him to the lower range for a career offender").

U.S. v. Stacy, No. 89-2780 (7th Cir. May 17, 1990) (per curiam, unpub. disposition) (affirming upward departure based on similarity of crime to prior offense, *accord U.S. v. Carey*, 898 F.2d 642 (8th Cir. 1990); *U.S. v. Luna-Trujillo*, 868 F.2d 122 (5th Cir. 1989), and the additional factor of proximity in time to similar prior offense, *accord U.S. v. Sturgis*,

869 F.2d 54 (2d Cir. 1989)). *See also U.S. v. Chavez-Botello*, No. 89-30175 (9th Cir. June 5, 1990) (per curiam) (similarity between current offense and prior offenses is not considered in Guidelines and may provide basis for departure).

Substantial Assistance

U.S. v. Howard, 902 F.2d 894 (11th Cir. 1990) ("sentencing court is obligated to rule on a [U.S.S.G.] section 5K1.1 motion at the time of sentencing," and may not postpone the ruling on the basis that most of defendant's agreed-upon cooperation had not yet occurred at time of sentencing and government could later file motion under Fed. R. Crim. P. 35(b) for reduction of sentence).

Adjustments

Role in the Offense

U.S. v. Preakos, No. 90-1055 (1st Cir. June 21, 1990) (per curiam) (when finding defendant was organizer or leader of criminal activity involving "five or more participants," U.S.S.G. § 3B1.1(a), may count defendant as one of the five).

Victim-Related Adjustments

U.S. v. White, 903 F.2d 457 (7th Cir. 1990) (enhancement for "vulnerable victim," U.S.S.G. § 3A1.1, properly given to defendant who took sixty-year-old man with respiratory problems hostage during escape attempt).

U.S. v. Schroeder, 902 F.2d 1469 (10th Cir. 1990) (reversing "official victim" enhancement under U.S.S.G. § 3A1.2 for defendant convicted of interstate communication of a threat to injure—holding an official victim under § 3A1.2 must be the object of the threat, whereas here the official merely received a threat directed at others).

Acceptance of Responsibility

U.S. v. Oliveras, No. 89-1380 (2d Cir. June 4, 1990) (per curiam) (agreeing with *U.S. v. Perez-Franco*, 873 F.2d 455 (1st Cir. 1989), that defendant need only accept responsibility for offense of conviction, and not also for counts that have been dismissed). *But see U.S. v. Gordon*, 895 F.2d 932 (4th Cir. 1990) ("defendant must . . . accept responsibility for all of his criminal conduct").

Determining the Sentence

Consecutive or Concurrent Sentences

U.S. v. Garcia, 903 F.2d 1022 (5th Cir. 1990) (agreeing with *U.S. v. Wuford*, 894 F.2d 665 (4th Cir. 1990), that sentencing courts have discretion to impose consecutive sentences when defendant is convicted of both Guidelines and pre-Guidelines offenses).

U.S. v. Miller, 903 F.2d 341 (5th Cir. 1990) (agreeing with *U.S. v. Rogers*, 897 F.2d 134 (4th Cir. 1990), and *U.S. v. [illegible]nent*, 881 F.2d 976 (11th Cir. 1989), that district courts did not have discretion under the former version of U.S.S.G. § 5G1.3 to impose consecutive or concurrent sentences, but that courts could depart to impose concurrent sentences when appropriate). *Contra U.S. v. Nottingham*, 898 F.2d 390 (3d Cir. 1990) (§ 5G1.3 conflicts with statute, district courts retain discretion); *U.S. v. Wills*, 881 F.2d 823 (9th Cir. 1989) (same).

Criminal History

Career Offender

U.S. v. Selfa, No. 89-10309 (9th Cir. June 14, 1990) (Schroeder, J.) (rejecting defendant's argument for hearing to determine whether his two previous bank robberies were "crimes of violence" under career offender provision, holding "that persons convicted of [bank robbery under] 18 U.S.C. § 2113(a) have been convicted of a 'crime of violence' within the meaning of Guideline Section 4B1.1. We conclude that the elements of the crimes of which defendant was previously convicted, and not the particular conduct of the defendant on the day the crimes were committed, should control. Further satellite factual hearings should not be required as a matter of course in order to determine whether the defendant has previously been convicted of crimes of violence"). *Cf. Taylor v. U.S.*, 110 S. Ct. 2143, 2160 (1990) (holding that, when determining whether a prior offense was a "violent felony" under 18 U.S.C. § 924(e), Career Criminals Amendment Act of 1986, trial court is required "to look only to the fact of conviction and the statutory definition of the prior offense," and not to the facts underlying the conviction).

Sentencing Procedure

Evidence From Another Trial

U.S. v. Castellanos, No. 88-3535 (11th Cir. June 13, 1990) (Tjoflat, C.J.) (vacating prior opinion, at 882 F.2d 474 [2 *GSU* #12], and clarifying earlier holding: "evidence presented at the trial of another may not—without more—be used to fashion a defendant's sentence if the defendant objects. In such a case, where the defendant has not had the opportunity to rebut the evidence or generally to cast doubt upon its reliability, he must be afforded that opportunity. It was never the position of this panel that a sentencing court may not consider testimony from the trial of a third party as a matter of law; rather, we were of the view that a sentencing court must follow the procedural safeguards incorporated in section 6A1.3 of the guidelines . . . ."). *Cf. U.S. v. Bernaldez*, 893 F.2d 1177 (10th Cir. 1990) (may use reliable evidence from another trial). *But see U.S. v. Chandler*, 894 F.2d 463 (D.C. Cir. 1990) (per curiam) (table, unpub.) (error to use evidence from codefendant's trial to determine drug quantity).

Appellate Review

Overlapping Guideline Ranges

U.S. v. Dillon, No. 88-3505 (7th Cir. June 20, 1990) (Kanne, J.) (upholding sentence even though district court erred in placing defendant in criminal history category II instead of category I, because resulting sentencing ranges overlapped and conduct that caused court to use category II could have been used to sentence defendant at upper end of the lower range—disputes over proper criminal history category need not be resolved if resulting ranges overlap and "it is reasonable to conclude that the same sentence would have been imposed irrespective of the outcome of the dispute"). *Accord U.S. v. Williams*, 891 F.2d 921 (D.C. Cir. 1989); *U.S. v. Turner*, 881 F.2d 684 (9th Cir.), *cert. denied*, 110 S. Ct. 196 (1989); *U.S. v. Barmingham*, 855 F.2d 925 (2d Cir. 1988).

EXHIBIT G

Federal Sentencing & Forfeiture Guide NEWSLETTER

by Roger W. Haines Jr.

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Includes Guideline and Forfeiture cases from ALL circuits.

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Guideline Sentences, Generally

4th Circuit upholds waiver of right to appeal sentence. (102)(154)(157) In the first appellate opinion on the subject, the 4th Circuit held that "a defendant that pleads guilty, and expressly waives the statutory right to raise objections to a sentence, may not then seek to appeal the very sentence which itself was part of the agreement." The defendant here pled guilty to obstruction of justice under 18 U.S.C. section 1503, in return for the government's dismissal of a perjury charge. The plea agreement provided that the defendant "expressly waives the right to appeal his sentence on any ground, including any appeal right conferred by 18 U.S.C. section 3742." The 4th Circuit said that the government "has added the waiver language to its standard plea precisely because it preserves finality of judgements and sentences imposed pursuant to valid pleas of guilty. In our view such waivers should be given their proper effect." *U.S. v. Wiggins*, __ F.2d __ (4th Cir. May 29, 1990) No. 89-5109.

5th Circuit finds no inconsistency between statute and guideline regarding consecutive sentencing. (105)(141) The 5th Circuit noted that at least four courts of appeals have

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addressed the possible conflict between section 3584(a) which gives the district court discretion as to whether to impose consecutive or concurrent sentences and section 5G1.3, which seemingly does not permit such discretion. All courts appear to agree that the district court under the text of section 3584(a) must retain some discretion as to whether to impose consecutive or concurrent sentences. The courts diverge, when they reach the question of whether the grant of discretion made by section 3584(a) is sufficiently unambiguous that any limitation upon that discretion imposed by section 5G1.3 is contrary to law. The 5th Circuit chose to follow the position of the 5th and 11th Circuit rather than that of the 3rd and 9th Circuits and held that "absent a departure from the guidelines, the facts of the instant case required consecutive sentences." *U.S. v. Miller*, __ F.2d __ (5th Cir. May 30, 1990) No. 89-2765.

5th Circuit holds that motion to modify based upon possible retroactivity of amended guideline must be filed in district court. (106) The defendant argued that because the Commission had amended the consecutive sentence guideline, 5G1.3, his case should be remanded for resentencing to give the court an opportunity to consider the possible retroactivity of the amended guideline under 18 U.S.C. section 3582(c) and section 1B1.10. The 5th Circuit rejected the argument, noting that section 1B1.10(a) states that a change in the guidelines that results in the possibility of a lower sentencing range may be a ground for reconsideration of sentence under section 3582(c)(2) only in the case of a few particular amendments, namely those amendments listed in section 1B1.10(d). Moreover under section 3582(c)(2), the defendant must first file his motion for modification with the district court. *U.S. v. Miller*, __ F.2d __ (5th Cir. May 30, 1990) No. 89-2765.

11th Circuit remands where district court failed to consider pre-guideline and guideline offenses separately. (106) Defendant committed most of his substantive crimes after the effective date of the sentencing guidelines. However, defendant also committed several substantive crimes before the guidelines' effective date. In sentencing, the district court did not consider the guidelines for any of the counts. The 11th Circuit reversed, remanding for resentencing with instructions for the district court to consider the guidelines in sentencing on all counts or to sentence on the pre-guidelines counts without reference to the guidelines and impose a guideline sentence only on the post-guidelines counts. *U.S. v. Curry*, __ F.2d __ (11th Cir. June 5, 1990) No. 89-7028.

General Application Principles (Chapter 1)

9th Circuit holds pellet guns and inoperable revolvers justify enhancement for brandishing dangerous weapon. (107)(113) The guidelines increase the offense level for certain crimes if a "dangerous weapon (including a firearm)" is brandished, displayed, or possessed. Defendant argued that such an enhancement was inappropriate in his case because the gun he used was shown by the evidence to be either a pellet gun or an inoperable revolver. Judges O'Scannlain, Nelson, and Norris disagreed. An inoperable revolver is a "firearm" if it "may be readily . . . converted" to be operable. And while a pellet gun does not satisfy the definition of a "firearm," it nevertheless qualifies as a "dangerous weapon." Both a pellet gun and an inoperable revolver can instill fear in a victim and prompt a violent response; in addition, they can cause harm when used as a bludgeon. They therefore meet the requirement of being "capable of inflicting death or serious bodily injury." *U.S. v. Smith*, ___ F.2d ___, 90 D.A.R. 6520 (9th Cir. June 12, 1990) Nos. 89-50321, -50367.

8th Circuit holds that sentencing guidelines apply to Indian offenses. (110)(127) Reversing the decision in *U.S. v. Norquay*, 708 F.Supp. 1064 (D. Minn. 1989), the 8th Circuit held that the federal sentencing guidelines apply to convictions under the Indian Major Crimes Act, 18 U.S.C. section 1153. The Major Crimes Act makes burglary committed by an Indian within "Indian country" a federal crime. Because there exists no federal statute describing what conduct constitutes the crime of burglary, the Major Crimes Act incorporates the law of the state in which the burglary was committed for purposes of defining the crime and establishing the punishment. The district court held that this meant that Minnesota's sentencing guidelines should govern the defendant's sentence. The 8th Circuit disagreed, holding that the federal sentencing guidelines applied, but that the sentence could not exceed any maximum sentence under Minnesota

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law. *U.S. v. Norquay*, __ F.2d __ (8th Cir. June 12, 1990) No. 89-5382.

8th Circuit holds that federal law on "good time" credits and concurrent sentencing applies to Indian offenses. (110)(140) The incorporation of state law in the Indian Major Crimes Act does not mean that federal courts must follow "every last nuance of the sentence that would be imposed in state court." Thus the 8th Circuit held that since the prisoner was a federal prisoner, the conditions of his confinement and release on parole should be controlled by federal correctional policies. To hold otherwise would be to have two classes of prisoners serving in the federal prisons: Assimilative Crimes Act prisoners and all other federal prisoners. The court found that this would be disruptive, and was not required under federal law. *U.S. v. Norquay*, __ F.2d __ (8th Cir. June 12, 1990) No. 89-5382.

Offense Conduct, Generally (Chapter 2)

2nd Circuit holds that "amount of loss" is that taken from a rightful owner, even if some is immediately recovered. (113) Defendant commandeered an armored car at gunpoint, removed its occupants, and drove away. Before abandoning the car they removed $247,000 of the $357,000 in the car. Defendant's base offense level was determined by the amount of loss, which was found to be the $347,000 amount. The 2nd Circuit affirmed, holding that under guidelines section 2B1.1 application note 2, property removed from its rightful owner is properly considered taken even if immediately recovered. By driving the car away, defendants exercised dominion and control over the entire amount even though they subsequently left some money behind in their transfer to a getaway car. *U.S. v. Parker*, __ F.2d __ (2nd Cir. May 7, 1990) No. 89-1390.

5th Circuit upholds district court's refusal to aggregate prior robbery conviction with present robberies. (113)(132)(134) Defendant pled guilty and was sentenced for an Arizona bank robbery. At the time of his plea he confessed to having robbed seven other financial institutions. He then pled guilty to six of the other robberies, and argued at sentencing that the Arizona robbery should have been aggregated with the other six in calculating his base offense level under the guidelines. He argued that they were all "related cases under section 4A1.2(a)(2). The 5th Circuit rejected the argument however, noting that section 4A1.2 deals only with how to treat prior convictions. It "does not permit the aggregation of prior convictions with those convictions for which the defendant is presently being sentenced." The court added that the multiple count section, 3D1.4, "does control how to aggregate the six crimes for which the court was sentencing [the defendant], the court properly awarded three criminal history points for the Arizona bank robbery under section 4A1.1(a). *U.S. v. Miller*, __ F.2d __ (5th Cir. May 30, 1990) No. 89-2765.

9th Circuit approves determining value of stolen architect's drawings by reference to contract price. (113) Defendant was convicted of receiving 30 stolen architect's technical drawings of designs for a commercial development. The sentencing judge valued the drawings at $118,400 by multiplying their commissioned price by their percentage of completion (80 percent). Defendant argued that the drawings should have been valued at zero because they were worthless to defendant and were incomplete and therefore worthless to the architect's client. Circuit Judges Canby and Schroeder and District Judge Rea disagreed. An enhancement based on value is permissible when the stolen property has value to the victim even if it has none to the defendant. And although the drawings were unfinished, the victim may have been able to pay to have them completed for 20 percent of the commissioned price. In light of the unique nature of the stolen property, the court held that the district judge acted within his discretion in valuing the property. *U.S. v. Pemberton*, __ F.2d __, 90 D.A.R. 6004 (9th Cir. May 31, 1990).

9th Circuit upholds guidelines' treatment of loss for bank robbery as at least $5,000. (113) Before its November, 1989, amendment, U.S.S.G. 2B3.1 required that the loss for robbery of a financial institution be treated as at least $5,000. Defendant robbed only $1,100 and argued that the $5,000 "presumption" violated due process because there was "no rational connection between the fact proved and the ultimate fact presumed." Judges O'Scannlain, Nelson, and Norris rejected defendant's characterization of the provision as a presumption. The reference to a $5,000 loss is intended only to refer to the one level enhancement considered appropriate for bank robbery. The crucial fact is the nature of the institution robbed, rather than the amount actually taken. Because banks usually have substantial cash on hand, a defendant's failure to obtain a large amount is usually a matter of chance that should not be reflected in the penalty. *U.S. v. Smith*, __ F.2d __, 90 D.A.R. 6520 (9th Cir. June 12, 1990) Nos. 89-50321, -50367.

10th Circuit holds that upward departures from criminal history category VI are guided by proportionality, not next highest offense level. (113)(148) Defendant pled guilty to bank fraud. Although several previous convictions were not counted, defendant had 25 criminal history points, 12 higher than the threshold for the highest criminal history category of VI. Additionally, defendant's instant offense was of a similar nature to his previous offenses. The district court departed upward from a range of 18-24 months to five years based on a finding that the sentencing guidelines did not take into account defendant's long criminal history. On appeal, defendant argued that a departure upward from criminal history category VI must be guided by the next highest offense level. The 10th Circuit disagreed, holding that the

Commission did not intend such a procedure. The court held that it must use its own judgment as to whether the sentence imposed is proportional to the crime, and in this case held that, although near the limit, the sentence was proportional. *U.S. v. Bernhardt*, __ F.2d __ (10th Cir. June 11, 1990) No. 89-6323.

(113) see (107)

2nd Circuit affirms sentence even though judge made misstatements about quantity of drugs involved. (115)(152) At sentencing, the judge made several misstatements as to the amount of cocaine involved in a conspiracy to distribute drugs. However, the findings were within the "range" of the jury's special verdicts. The 2nd Circuit affirmed the sentence because the judge presided over the trial and heard all the testimony. Further, defendant offered no evidence contesting the facts found during sentencing. *U.S. v. Campriano*, __ F.2d __ (2nd Cir. June 11, 1990) No. 89-1371.

6th Circuit states that amounts of drugs not considered under relevant conduct may be a basis for departure. (115)(149) The district court departed upward, in part because of its belief that the guidelines did not adequately consider "continuing operations." The 6th Circuit held that continuing operations "falls under the category of relevant conduct." The court noted that this is a proper rationale for departure, assuming that there is a preponderance of the evidence suggesting that this was an ongoing operation, and that the amounts of drugs transacted are not adequately included in the prisoner's offense level. The court remanded the case to the district court for a better determination. *U.S. v. Robison*, __ F.2d __ (6th Cir. June 1, 1990) No. 89-3724.

5th Circuit reverses upward departure based on involvement of minor in drug activities. (115) The district court departed upward from 87 months to 300 months because, at the time of defendant's arrest on cocaine charges, a 15 year old girl was present in his automobile. The defendant argued that if he had been convicted of the offense of involving a minor in a drug transaction in violation of 18 U.S.C. section 845b, the maximum sentence that he could receive would be 108 months. The 5th Circuit reversed the sentence, holding that although the district court was not strictly bound by the adjustment for involvement of a minor specified in section 2D1.2, it held that on remand the district court should explain its reasons for going beyond that guideline range. Moreover the court noted that the government presented no direct evidence that the minor was either involved in the conspiracy or bought, sold or used drugs. *U.S. v. Landry*, __ F.2d __ (5th Cir. May 30, 1990) No. 89-3275.

6th Circuit reverses district court's finding as to amount of drugs where based on "guess." (115)(150) Relying on defendant's girlfriend's "guess" of 3-4 ounces of cocaine distributed per week, the district court arrived at a median figure of 3-1/2 ounces and then calculated a total amount of "420" ounces of cocaine sold during the period of the conspiracy. The 6th Circuit held that this evidence did not satisfy the "preponderance of the evidence" standard. The girlfriend was admittedly a heavy drug user and subject to periods of memory loss. In addition she admitted that the time period at issue in the case was a "a very hazy time" because of heavy drug usage. She testified that she was pressured into estimating the quantities of drugs, and admitted on cross examination that "it was totally a guess" and that she had "no factual basis" for assigning a number to the quantities of drugs. The court held that the district court's finding was clearly erroneous. *U.S. v. Robison*, __ F.2d __ (6th Cir. June 1, 1990) No. 89-3724.

9th Circuit includes drugs in dismissed count in calculating sentence. (115) The guideline sentence for drug offenses varies depending on the amount of drug involved. Defendant argued that the sentencing judge erred by including drugs involved in a dismissed count in calculating defendant's sentence. Following circuit precedent, Judges Fernandez, Tang, and Norris concluded that inclusion of the drugs was proper because they were "part of the same course of conduct or part of a common scheme or plan as the count of conviction." Moreover, the court noted that the challenged quantity did not change defendant's offense level, and no evidence suggested that the sentencing judge relied on the challenged quantity in determining what sentence within the guidelines to give defendant. *U.S. v. Avila*, ___ F.2d ___, 90 D.A.R. 6382 (9th Cir. June 8, 1990) No. 89-10390.

11th Circuit reverses heroin sentence where method of calculating amount of heroin was unclear. (115)(152) The sentencing court concluded that at least 100 grams of heroin were implicated. However "great discrepancy appeared in the trial record describing the method of weighing the heroin by spoons." Thus the 11th Circuit stated that it was "unable to determine whether the sentencing court made a finding of fact on the record once the amount of heroin was controverted." Accordingly the sentences were vacated and remanded for the purposes of conducting an evidentiary hearing "that will examine carefully the evidence received at trial regarding the weight of heroin." *U.S. v. Davis*, __ F.2d __ (11th Cir. June 4, 1990) No. 88-7685.

1st Circuit affirms firearm enhancement even though defendant carried a gun in his occupation as a police officer. (116) Defendant was a police officer convicted of racketeering and drug trafficking. At sentencing, the district court elevated his basic offense level for possession of a firearm during a drug offense. Defendant argued the connection was tenuous since he lawfully carried a gun as a police officer rather than as a means for facilitating drug offenses. The 1st Circuit rejected the argument, ruling that there is no requirement that the weapon be used or be intended to use in a drug crime. Since defendant was known to carry a gun,

confidence was likely instilled in those who relied on him for protection in selling drugs, and fear in those who dealt with his suppliers. Because it was not clearly improbable that defendant's weapon was connected with his drug offenses, the district court's factual finding was not clearly erroneous. *U.S. v. Ruiz*, __ F.2d __ (1st Cir. June 5, 1990) No. 89-1815.

11th Circuit upholds enhancement for possession of weapon during drug transaction. (116) The district court found that the defendant was present when a drug transaction was discussed between his mother and the undercover police officer and at that time had in his possession a pistol and a shotgun. The 11th Circuit upheld this finding as not "clearly erroneous." *U.S. v. Sherman*, __ F.2d __ (11th Cir. June 4, 1990) No. 88-8885.

10th Circuit reverses upward departure because guidelines adequately covered conduct. (119)(149) Defendant pled guilty to one count of a three count indictment for abusive sexual conduct. The district court departed upward, based on a finding that defendant had abused his position of trust since he was a personal friend of the victim thus causing extreme psychological harm, and that defendant had engaged in similar behavior for a period of time with the same victim. The 10th Circuit reversed. The departure based on abuse of trust was improper because sentencing guideline section 3B1.3 adequately covers the situation of abusive sexual conduct achieved through a position of trust. The court also reversed the departure on grounds of extreme psychological injury because the victim did *not* suffer more than normal. Finally, the departure based on similar conduct to the dismissed counts was upheld pursuant to the analysis of *U.S. v. Kim*, 896 F.2d 678 (2nd Cir. 1990). *U.S. v. Zamarripa*, __ F.2d __ (2nd Cir. June 11, 1990) No. 89-2145.

5th Circuit upholds consecutive sentences for pre- and post-guideline convictions. (125)(141) Defendant filed a false claim for an income tax return in 1986, prior to the guidelines' effective date. On November 1, 1988 (after the guidelines effective date) defendant attempted to obstruct an investigation into the crime by bribing a witness. Following a guilty plea to the pre-guideline and post-guideline offenses, defendant was sentenced on the pre-guideline offense to the maximum term and also received a consecutive sentence for the post-guideline offense. The 5th Circuit affirmed, even though the court ruled that a sentencing court has "discretionary power to impose consecutive sentences contrary to the mandates of the guidelines where a defendant is convicted of both guideline and pre-guideline offenses." *U.S. v. Garcia*, __ F.2d __ (5th Cir. June 6, 1990) No. 89-7074."

(127) see (110)

Adjustments (Chapter 3)

8th Circuit upholds finding that older victim was "unusually vulnerable." (129) Defendant extorted money from an older victim over a several month period. The district court found that the victim was chosen because he was an easy target for the fraud, and because of the size difference between defendant and the victim. The court also found that victim, although not mentally handicapped, had a mental condition upon which defendant preyed. Based on these facts, the finding that the victim was unusually vulnerable was not clearly erroneous. *U.S. v. Boult*, __ F.2d __ (5th Cir. June 5, 1990) No. 89-2808.

8th Circuit rules that section 3A1.1 is not unconstitutionally vague. (129) Defendant argued that guideline section 3A1.1 (vulnerability of a victim) is unconstitutionally vague and that a finding of vulnerability predicated on the age of a victim is improper. The 8th Circuit disagreed. Age is only a factor to be considered, along with physical condition, mental condition, and particular susceptibility to a crime. The descriptive phrases to section 3A1.1 are not unconstitutionally vague because the guideline "sufficiently defines a factual pattern to which it applies. *U.S. v. Boult*, __ F.2d __ (5th Cir. June 5, 1990) No. 89-2808.

2nd Circuit upholds finding that defendant was an "organizer" of an offense. (130) Defendant planned the details of a robbery, recruited his friends as accomplices, assigned roles in the offense and controlled distribution of the loot. Under these facts, the 2nd Circuit held that the district court correctly determined that defendant was an "organizer" in the offense. *U.S. v. Parker*, __ F.2d __ (2nd Cir. May 7, 1990) No. 89-1390.

2nd Circuit finds "insider" in an armored car robbery was a minor participant. (130) Defendant acted as an inside man in an armored car robbery, providing information on the scheduled movements of an armored car. Additionally, defendant rented a car to be used in the robbery and knew the activities of other defendants. Based on these facts, the 2nd Circuit held that the district court properly decided that he was a "minor participant" in the offense and thus entitled to only a two point reduction for his role in the offense. *U.S. v Parker*, __ F.2d __ (2nd Cir. May 7, 1990) No. 89-1390.

9th Circuit upholds leadership enhancement where defendant coordinated buying and selling drugs. (130) The guidelines impose greater penalties on the organizers and leaders of criminal conspiracies than on other participants. Defendant challenged the sentencing judge's conclusion that defendant was an organizer or leader in the drug conspiracies for which he was convicted. Judges Fernandez, Tang, and Norris concluded that the sentencing judge's finding that defendant was an organizer or leader was not clearly erroneous. The court relied on the reasons listed in the presentence report, incorporated by reference by the sentencing judge. Defendant was a "heavy drug dealer" commonly

dealing in cocaine and heroin; he negotiated the price during drug deals; he had indicated that he had alternative sources should his usual suppliers be unable to meet demand; and several of his undercover negotiations dealt with large amounts of currency in exchange for large amounts of illegal substances. *U.S. v. Avila*, __ F.2d __, 90 D.A.R. 6382 (9th Cir. June 8, 1990) No. 89-10390.

9th Circuit upholds leadership enhancement even though only two participants commited a single crime. (130) The sentencing judge enhanced defendant's sentence because of defendant's leadership role in a single drug transaction. Defendant argued that this could cause the leader of a single drug sale to receive the same sentence as the leader of an ongoing criminal enterprise. Judges Wallace, Alarcon, and Leavy agreed, but upheld the enhancement. The court noted that the 1989 amendments to the guidelines remove this anomoly by increasing the sentence for participation in a continuing criminal enterprise. The court characterized as "entirely without merit" defendant's argument that the leadership enhancement is inapplicable to crimes involving only two participants. Regarding defendant's role as a leader, the court found that the sentencing judge did not commit clear error in making this "essentially factual determination" in light of defendant's control of the drug transaction. *U.S. v. Carvajal*, __ F.2d __, 90 D.A.R. 6517 (9th Cir. June 12, 1990) No. 89-10184.

9th Circuit refuses to consider merits of minor-participant argument where defendant failed to object below. (130)(157) Defendant argued that the sentencing judge erred in not granting him an adjustment for being minor or minimal participant. Judges O'Scannlain, Nelson, and Norris refused to consider the merits of this argument because defendant did not raise the issue before the sentencing judge. No "exceptional circumstances" excused the failure to raise the issue. The issue did not arise on appeal because of a change in the law. And the minor-participant issue is not "purely one of law" the resolution of which would impose no prejudice on the opposing party. *U.S. v. Smith*, __ F.2d __, 90 D.A.R. 6520 (9th Cir. June 12, 1990) Nos. 89-50321, -50367.

11th Circuit reviews district court's finding as to 'role in offense' under the 'clearly erroneous' standard. (130)(159) The 11th Circuit concluded that the district court was not clearly erroneous in finding that defendant was not entitled to a reduction in his offense level for being a minimal or minor participant. The court found that the sentencing judge placed the burden of persuasion on the government, but found that the evidence was such that without more from the defendant, it could not conclude that the defendant was entitled to any reduction in the offense level. The court found that this ruling was not "clearly erroneous." *U.S. v. Taxacher*, __ F.2d __ (11th Cir. June 4, 1990) No. 88-8596.

8th Circuit holds that use of an alias qualifies for obstruction of justice increase even if authorities are not fooled. (131) Defendant used an alias during a detention hearing and a pre-jail interview. He argued that a two-level increase for obstruction of justice was improper absent a showing of actual prejudice to the government. The 8th Circuit disagreed, ruling that use of an alias qualifies a defendant for an increase, regardless of whether authorities were fooled by the false identification. No finding of actual prejudice to the government is required. *U.S. v. Blackman*, __ F.2d __ (8th Cir. June 4, 1990) No. 88-2771.

9th Circuit requires enhancement for obstruction of justice despite subsequent cooperative acts. (131) After pretrial release on drug charges, defendant absconded from supervised release and remained a fugitive for five months. Defendant did not dispute that such acts constitute obstruction of justice under the guidelines. Rather, he argued that the two-point enhancement should not have been made because he eventually voluntarily surrenderred to authorities. Judges Fernandez, Tang, and Norris disagreed, holding that the two-point enhancement is mandatory whenever obstruction of justice is shown. Subsequent cooperative acts may be taken into account by the sentencing judge in determining where within the guideline range to sentence defendant, or by making other allowed adjustments. *U.S. v. Avila*, __ F.2d __, 90 D.A.R. 6382 (9th Cir. June 8, 1990) No. 89-10390.

5th Circuit holds that fact that defendant could have received a greater punishment had he been sentenced separately in each jurisdiction, did not justify upward departure. (132)(148) The 5th Circuit held that the fact that defendant could have received a greater punishment had he been sentenced separately in each jurisdiction where he committed a bank robbery, could not provide a basis for departure. "Under section 3D1.4 the Commission has made its determination as to how to calculate the offense level when multiple offenses are being sentenced in a single proceeding." "The policy rationale of section 3D1.4 is no less applicable because some of the crimes were committed in different places; its aggregation formula should govern the result here." *U.S. v. Miller*, __ F.2d __ (5th Cir. May 30, 1990) No. 89-2765.

(132) see (113)

2nd Circuit affirms constitutionality of guideline section 3E1.1 (acceptance of responsibility). (133) The 2nd Circuit rejected a defendant's contention that the availability of a sentence reduction to one who early admits personal responsibility for the offense is the equivalent of an increase in sentence for one who does not. The court held that the contention that a refusal to grant a reduction penalizes those who maintain their innocence and go to trial was a meritless one. Guideline section 3E1.1 (acceptance of responsibility) is neither unconstitutional nor an impermissible prejudice of

the right to appeal in its requirement that a person admit responsibility to receive a two level reduction in the offense level. *U.S. v. Parker,* _ F.2d _ (2nd Cir. June 11, 1990) No. 89-2145.

9th Circuit finds obstruction of justice precludes adjustment for acceptance of responsibility. (133) Defendant, who obstructed justice during the course of his crime, argued that the sentencing judge erred in failing to grant him a two-point reduction for acceptance of responsibility. Judges Fernandez, Tang, and Norris affirmed the sentence. The court noted that defendant's sentence was constrained by the pertinent policy statements of the Sentencing Commission in effect on the date of defendant's sentencing. At that time, an application note precluded a downward adjustment for acceptance of responsibility in any case where defendant had obstructed justice. A later amendment to the application note left open the possibility of a downward adjustment in such cases. While this amendment would constitute "strongly persuasive evidence" of the proper construction of the earlier provision if the amendment was intended "only to clarify" earlier provisions, the court determined that the amendment was not merely clarifying, and therefore did not apply. *U.S. v. Avila,* ___ F.2d ___, 90 D.A.R. 6382 (9th Cir. June 8, 1990) No. 89-10390.

9th Circuit affirms denial of acceptance-of-responsibility reduction where defendant pled guilty but told conflicting stories. (133) Despite defendant's guilty plea, the sentencing judge denied a reduction for acceptance of responsibility. Judges O'Scannlain, Nelson, and Norris affirmed, finding the denial was not "without foundation." Though defendant argued that his statements to FBI agents had provided them with enough information to arrest other participants in defendant's robbery, the court noted that defendant had told substantially different versions of the facts to the FBI and the probation officer, ultimately attempting to deny knowledge that his cohorts were carrying a gun and claiming that he was coerced into committing the offense. Following circuit precedent, the court also found that the acceptance-of-responsibility provision does not violate the right against self-incrimination. *U.S. v. Smith,* ___ F.2d ___, 90 D.A.R. 6520 (9th Cir. June 12, 1990) Nos. 89-50321, -50367.

Criminal History (§ 4A)

9th Circuit affirms treatment of multiple convictions as separate despite concurrent sentences. (134) In calculating a defendant's criminal history score, the guidelines sometimes count related convictions as less significant than unrelated convictions. At two separate proceedings, defendant was sentenced to probation on two separate crimes. Defendant's probation was later revoked, at which time concurrent prison terms were imposed on the convictions. Because the sentences were concurrent, defendant argued that the convictions should not be given full weight in calculating his criminal history score. Judges O'Scannlain, Nelson, and Norris found this position "meritless." *U.S. v. Smith,* ___ F.2d ___, 90 D.A.R. 6520 (9th Cir. June 12, 1990) Nos. 89-50321, -50367.

(134) **see** (113)

1st Circuit holds amendment permitting acceptance of responsibility for career offenders not retroactive. (135) Defendant was sentenced under unamended guideline section 4B1.1, which forbade an adjustment for "acceptance of responsibility" for career offenders. Amendment #266 to section 4B1.1, effective November 1, 1989 allows a reduction for acceptance of responsibility. The 1st Circuit held that the amendment was a "change" in section 4B1.1, not a clarification. The court refused to apply the statute retroactively absent an authorization from the Sentencing Commission, citing the statutes' language, considerations of administrative policy and the different background retroactivity assumptions in the area of substantive criminal law. *U.S. v. Havener,* _ F.2d _ (1st Cir. June 5, 1990).

Determining the Sentence (Chapter 5)

9th Circuit holds that illegality of requested relief defeats prisoner's due process claim. (140) The Oregon Board of Parole set a 1987 release date for petitioner based on a mistaken application of the state's "matrix system." The date was later corrected. Petitioner claimed that his right to due process was violated by the state's refusal to abide by the 1987 date. Judges Alarcon, Browning, and Kozinski disagreed. Because the 1987 date violated the matrix system, the Board's establishment of the date created no protected liberty interest. And while some evidence suggested that the Board was "biased and prejudiced" against petitioner, that claim would not support the relief petitioner sought. Petitioner sought enforcement of the 1987 date, while at most he would have been entitled to the setting of a legal release date by an unbiased Board. *O'Bremski v. Maass,* ___ F.2d ___, 90 D.A.R. 6300 (9th Cir. June 6, 1990) No. 89-35582.

(140) **see** (110)

5th Circuit upholds consecutive sentences for separate bank robbery convictions. (141) U.S.S.G. Section 5G1.3 states that "if at the time of sentencing, the defendant is already serving one or more unexpired sentences, then the sentences for the instant offense(s) shall run consecutively to such unexpired sentences, unless one or more of the instant offense(s) arose out of the same transactions or occurrence as the unexpired sentences. The defendant here argued that the six bank robberies on which he was convicted "arose out of the same transactions or occurrences as the unexpired sentence" im-

posed for the Phoenix bank robbery. The 5th Circuit rejected the argument noting that the Phoenix robbery occurred neither on the same day nor in the same state as any of the other robberies. The court also rejected defendant's argument that the district court believed the requirement for consecutive sentences was so absolute that no departure from the guideline rule was permitted. *U.S. v. Miller*, __ F.2d __ (5th Cir. May 30, 1990) No. 89-2765.

(141) see (105)(125)

2nd Circuit finds downward departure justified by defendant's 'extreme vulnerability' in prison. (142)(147) Although the defendant was 22 years old, he looked 16 and was a "delicate looking young man, with a certain sweetness about him." At his resentencing, defense counsel said that he had been victimized as a consequence of his diminutive size, immature appearance and bisexual orientation. He said that two other inmates were attempting to coerce defendant into becoming a male prostitute. The head of the jail unit responded to this event by placing defendant in solitary confinement--also known as "the hole." The district court ruled that these factors were not adequately considered by the Sentencing Commission, and accordingly he departed downward from the sentencing guidelines. The 2nd Circuit affirmed, holding that "it is plain that the Commission did not consider vulnerability to the extent revealed in this record--where the only means for prison officials to protect [defendant] was to place him in solitary confinement. Senior district judge Metzner, dissented. *U.S. v. Lara*, __ F.2d __ (2nd Cir. May 30, 1990) No. 89-1210.

Departures Generally (§ 5K)

5th Circuit reverses where defendant was given no notice of intention to depart upward. (145)(150) The presentence report recited that a 15-year-old minor was present at the scene of defendant's arrest. This fact, however was not suggested by the probation officer or the government as a basis for an upward departure from the guidelines. Furthermore, it was not until the sentencing hearing itself that this fact was even mentioned by the district court as the basis for an upward departure. Accordingly the 5th Circuit held that defendant was not given an opportunity to comment on this fact at the sentencing hearing. The upward departure for involvement of a minor in narcotics activities was reversed. *U.S. v. Landry*, __ F.2d __ (5th Cir. May 30, 1990) No. 89-3275.

6th Circuit reverses upward departure that treated defendant as a 'career offender.' (145)(148) The district court departed from the guidelines in order to treat the defendant as a 'career offender' even though one of the offenses was beyond the ten-year limitation applicable to the career offender section. See Commentary to section 4B1.2. The court said that it believed that the prior conviction would have been countable but for the fact that the defendant received a "real break" from the sentencing judge in that case. The 6th Circuit reversed, holding that the district court "cannot arbitrarily change the requirements for career offender status established by the Sentencing Commission simply because it feels that [the defendant] got a break in 1971." *U.S. v. Robinson*, __ F.2d __ (6th Cir. June 1, 1990) No. 89-3724.

1st Circuit holds that government need not make a section 5K1.1 motion absent explicit promise to do so. (146)(154) Defendant argued that the precondition that a government motion section 5K1.1 is required for a downward departure for substantial assistance was unlawful. The 1st Circuit rejected the argument, citing its decision in *U.S. v. La Guardia*, __ F.2d __ (1st Cir. April 25, 1990) No. 89-1620. The court also held that there is no legal basis for requiring the government to make a section 5K1.1 motion unless it explicitly promised to do so, and that no such promise need be implied in a plea bargain agreement to make it meaningful. *U.S. v. Havener*, __ F.2d __ (1st Cir. June 5, 1990).

11th Circuit holds that court may not defer ruling on motion for departure based on cooperation. (146) At sentencing the government filed an *in camera* letter requesting that defendant be sentenced below the minimum guidelines sentence pursuant to section 5K1.1. The government planned to indict several of defendant's crack suppliers in the near future and it planned to use defendant's testimony in the prosecutions. The letter stated that defendant had "provided substantial assistance" by identifying people involved in the distribution of crack cocaine and by agreeing to testify against these people. The sentencing court stated that it would defer ruling on the motion because most of defendant's agreed upon cooperation had not yet taken place. On appeal the 11th Circuit reversed, holding that a district judge may not defer ruling on a 5K1.1 motion. By deferring its ruling, the district court essentially denied the defendant the "two bites at the apple" to which he is entitled, i.e. sentencing below the guidelines by way of section 5K1.1 and reduction through resentencing by way of Federal Rule of Criminal Procedure 35(b). "If a sentencing court refuses to make a section 5k1.1 reduction at the time of sentencing, the defendant has up to one year after sentencing to get his second 'bite' at reduction through Rule 35(b). *U.S. v. Howard*, __ F.2d __ (11th Cir. June 5, 1990) No. 89-3261.

Minnesota district court departs downward for substantial assistance, and defendant's 'extraordinary turnaround' since arrest. (146) At sentencing the government moved for a downward departure from the mandatory minimum sentence based on defendant's substantial assistance to the government. Prior to sentencing, the district court released her for 9 months, on condition that she submit to regular random drug testing. She demonstrated freedom from any drug

problems, and the court stated that it was convinced by "objective demonstrative evidence" that the defendant had "materially changed her life." Accordingly the district court sentence her to only six months in home detention, relying on her substantial assistance, the extraordinary turnaround in her life, the nature of the case in which she played only a minor role, and the fact that she had young children at home. *U.S. v. Floyd,* __ F.Supp __ (D. Minn. May 31, 1990) No. CR-4-89-4(2).

(147) see (142)

(148) see (113)(132)(145)

5th Circuit reverses upward departure based on defendant's alcohol dependency. (149) The 5th Circuit ruled that the district court failed to elucidate any extraordinary aspects of the defendant's alcohol dependency that would justify a departure from the guidelines. The court's statement "it's just amazing to me that no injury has been done" could not justify a departure from the guidelines. The sentencing guidelines consider the occurrence of injuries in the course of bank robberies and would have provided for an increased offense level if such injuries occurred. *U.S. v. Miller,* __ F.2d __ (5th Cir. May 30, 1990) No. 89-2765.

6th Circuit reverses upward departure based on "the harm of crack in our communities." (149) The 6th Circuit held that a departure based upon "the harm of crack in our communities" is clearly impermissible. The court noted that the Sentencing Commission has established penalties for crack transactions and it is not up to individual judges to determine whether those penalties are too harsh or too lenient. In any event, the defendant here was convicted of possession and distribution of cocaine, not crack. "Crack is a derivative of cocaine, not directly at issue in this case." *U.S. v. Robison,* __ F.2d __ (6th Cir. June 1, 1990) No. 89-3724.

6th Circuit reverses upward departure based on defendant's "propensity for violence." (149) The district court considered the defendant's propensity for violence and offenses using guns, in departing upward. The 6th Circuit held there may be cases in which this is a legitimate reason for an upward departure under section 5K2.6 of the guidelines which state that "the extent of the increase [departure] ordinarily should depend on the dangerousness of the weapon, the manner in which it was used, and the extent to which it endangered others." But here the defendant did not fire the gun, and would be serving a five year consecutive sentence for the firearm count. Accordingly, the 6th Circuit held that the guidelines already took into account the firearms aspect of the crime. As such it was an improper basis for departure. *U.S. v. Robison,* __ F.2d __ (6th Cir. June 1, 1990) No. 89-3724.

9th Circuit holds similarity of prior offenses supports departure, but likelihood of deportation does not. (149) Convicted of being an alien in the United States after deportation, defendant was sentenced in excess of the guidelines because he had twice previously been convicted of the same offense and would be deported immediately upon completion of his sentence, thereby avoiding payment of any fine and supervision upon release. In a per curiam opinion, Judges Browning, Alarcon, and Rymer agreed that the similarity of past offenses to the present offense could justify an upward departure. But the court held it was improper to depart based on the likelihood of deportation. In addition, the sentencing judge failed to indicate which criminal history category it considered analogous to defendant's history in determining the extent of the upward departure. *U.S. v. Chavez-Botello,* __ F.2d __, 90 D.A.R. 6228 (9th Cir. June 5, 1990) No. 89-30175.

11th Circuit holds that defendant's involvement of her son in her drug trafficking business, justified 10 month upward departure. (149) According to the district court, the defendant was responsible for her son's easy access to drugs and for his resulting chemical dependency. The 11th Circuit agreed with the district court that this factor was not taken into consideration by the guidelines and therefore justified an upward departure. The court further found that a 10 month upward departure from the 30 month offense level was reasonable. The court noted that the guidelines call for a two level increase when a victim of sexual abuse is in the custody of the defendant and a four level increase when a defendant has used coercion in transporting a minor for the purposes of prostitution. Here 10 months was the equivalent of a three level increase. The court stated that "although the reasonableness of a departure does not always depend on this sort of mathematical precision," the departure here was obviously reasonable. *U.S. v. Shuman,* __ F.2d __ (11th Cir. June 4, 1990) No. 88-8895.

6th Circuit reverses departure for involvement of a minor in a drug offense. (149) The 6th Circuit agreed that involvement of a minor in a drug offense can be considered as relevant conduct, but held that there was not a preponderance of evidence connecting the defendant to the employment of a minor. The indictment for involvement of a minor was of a codefendant. Thus the 6th Circuit held that the district court's finding that defendant involved a minor in a drug operation was clearly erroneous. *U.S. v. Robison,* __ F.2d __ (6th Cir. June 1, 1990) No. 89-3724.

(149) see (115)(119)

Sentencing Hearing
Burden of Proof (§ 6A)

(150) see (115)(145)

9th Circuit requires presentence report even though defendant had been in confinement. (151) Following defendant's conviction for escape, the trial judge stated that a presentence report would not be necessary because defendant had been in confinement, either in prison or in a work-release facility, since a previous conviction for which a presentence report had been prepared. Defendant then waived preparation of a new presentence report. Judges Wright, Poole, and Brunetti vacated the sentence, noting that the guidelines specifically forbid a defendant from waiving preparation of a presentence report. In addition, the court found inadequate the sentencing judge's reasons for dispensing with preparation of the report. Though incarcerated, defendant had accumulated a work record deserving consideration, and other information about defendant's confinement might have been relevant to the sentencing decision or to prison officials who might deal with defendant in the future. *U.S. v. Turner*, __ F.2d __, 90 D.A.R. 6385 (9th Cir. June 8, 1990) No. 89-30050.

9th Circuit sees no plain error in judge's reliance on non-record characteristics of typical drug deal. (152) In concluding that defendant was the leader in a drug transaction, the sentencing judge found that defendant's efforts to avoid being personally present at the deal's consummation "is typical of leaders." Though defendant failed to object at sentencing, he appealed on the ground that the judge employed a fact not in evidence – the typical conduct of leaders of drug transactions. Judges Wallace, Alarcon, and Leavy found no plain error. Even if defendant had objected, he would have had to show that the information used (1) was false or unreliable and (2) was demonstrably the basis for the sentence. Because defendant made no showing that the judge's information was false or unreliable, he did not establish any error. *U.S. v. Carvajal*, __ F.2d __, 90 D.A.R. 6517 (9th Cir. June 12, 1990) No. 89-10184.

(152) see (115)

Plea Agreements, Generally (§ 6B)

(154) see (182)(146)

9th Circuit limits ability to withdraw plea because of error in calculating sentence. (155) Relying on *U.S. v. Bennett*, 716 F.Supp. 1137 (N.D.Ind. 1989), defendant sought to withdraw his guilty plea because of a disparity between his plea expectation and the presentence report. Distinguishing *Bennett*, Judges Fernandez, Tang, and Norris refused to permit withdrawal. Unlike the defendants in *Bennett*, defendant made no effort to withdraw his plea prior to the imposition of his sentence. Moreover, defendant had been warned of the severity of the sentence he faced. *U.S. v. Avila*, __ F.2d __, 90 D.A.R. 6382 (9th Cir. June 8, 1990) No. 89-10390.

Appeal of Sentence (18 USC § 3742)

8th Circuit holds that failure to object waived issue on appeal. (157) Defendant counsel did not object at the sentencing hearing to any factual findings relevant to a two level increase for obstruction of justice for defendant's use of analysis. The 8th Circuit held that the failure to object waived defendant's right to challenge the accuracy or evidentiary basis for those rulings on appeal. *U.S. v. Blackman*, __ F.2d __ (8th Cir. June 4, 1990) No. 88-2771.

(157) see (182)(130)

8th Circuit reaffirms ruling that refusal to depart downward is not reviewable on appeal. (158) Defendant argued that the district court erred in refusing to depart downward on the basis of his psychological problems and diminished mental capacity. Reaffirming its earlier ruling, the 8th Circuit held that the district court's refusal to depart downward is not reviewable on appeal. *U.S. v. Follett*, __ F.2d __ (8th Cir. June 1, 1990) No. 89-2386.

11th Circuit holds that order deferring ruling on government's cooperation motion is appealable. (158) A sentencing which falls within the applicable guideline range is appealable if the defendant alleges either that the sentence was imposed in violation of law that the sentence was "plainly unreasonable and imposed for an offense 'for which there was no applicable guideline' or that the guidelines were incorrectly applied. Here the defendant claimed that the district court was required to rule on the government's section 5K1.1 motion for downward departure based on cooperation at the time of sentencing. The 11th Circuit held that defendant was arguing that the sentence was imposed in violation of law, and therefore his appeal was proper. *U.S. v. Howard*, __ F.2d __ (11th Cir. June 5, 1990) No. 89-3261.

8th Circuit reviews minor participant finding under "clearly erroneous" standard. (159) Defendant argued that the district court erred in failing to find that he was a minor participant pursuant to guidelines section 3B1.2. The 8th Circuit held that the district court's finding that defendant was not a minor participant is a finding of fact subject to review under the clearly erroneous standard. Here the record adequately supported the district court's finding. Accordingly the 8th Circuit upheld the finding as not clearly erroneous. *U.S. v. Follett*, __ F.2d __ (8th Cir. June 1, 1990) No. 89-2386.

8th Circuit holds that vulnerability of a victim is reviewed under the "clearly erroneous" standard. (159) Defendant received a two level increase in base offense level because the victim was especially vulnerable. The 8th Circuit ruled that the appropriate standard of review for determination of the vulnerability of a victim is the clearly erroneous standard. *U.S. v. Boult*, __ F.2d __ (5th Cir. June 5, 1990) No. 89-2808.

(159) see (130)

FORFEITURE CASES

7th Circuit rejects requirement of "substantial connection" for forfeiture of property. (190) The 4th and 8th Circuits have held that there must be a "substantial connection" between the forfeited property and the drug offense before real property can be forfeited under 21 U.S.C. section 881(a)(7). The 7th Circuit ruled that the distinction between a "substantial connection" test and the "in any manner, or part" language offered directly in the statute, "is blurry at best." The courts said that the "more principled and direct approach, and the one demanded by the plain wording of the statute itself, is to affirm forfeiture of any real estate that is used in any manner or part to commit or facilitate a commission of a drug related offense." In the present case, the undercover agent arranged to buy cocaine from the defendant by telephoning him at his house on two occasions. The 7th Circuit ruled that the district court properly found that the nexus between the defendant's house and the drug offense "was not incidental or fortuitous." *U.S. v. One Parcel of Real Estate commonly known as 916 Douglas Ave., Elgin, Illinois,* __ F.2d __ (7th Cir. May 29, 1990) No. 88-3361.

5th Circuit reverses stay of forfeiture proceedings where government failed to satisfy statutory requirements. (192) The government filed forfeiture actions against a shopping center and two residences, alleging that they constituted proceeds traceable to sales of illegal drugs. The government then obtained a stay of all proceedings pending the outcome of a criminal conspiracy case in the central district of California. None of the petitioners were named in the California case, and the 5th Circuit found that the petitioners would be deprived of the use of their property including their residence, for what could be a very long time, without ever having had an opportunity to know the evidence against them, challenge it, or even to have a hearing. Under the circumstances, the 5th Circuit concluded that the extraordinary remedy of mandamus was appropriate. The case was remanded to the district court to reconsider the stay and to consider the claimant's pending motion to dismiss the forfeiture complaint against their residences. *In re Ramu Corporation,* __ F.2d __ (5th Cir. May 29, 1990) No. 90-8151.

Federal Sentencing & Forfeiture Guide
NEWSLETTER

by Roger W. Haines Jr.

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Guideline Sentences, Generally

7th Circuit finds that assignment of weight to various factors does not violate due process. (115) A drug defendant argued that the guidelines violate due process because they arbitrarily assign weight to certain factors. The 7th Circuit rejected his challenge, finding that his real argument was that the guidelines limit judicial discretion and fail to require proof beyond a reasonable doubt of factors relied upon during sentencing. The 7th Circuit found that the defendant had not identified a sentencing factor accorded excessive weight by the district court. Moreover, relying on the Supreme Court's decision in *McMillan v. Pennsylvania*, 477 U.S. 9 (1986), sentencing factors can be proven by a *preponderance* of the evidence without violating due process. *U.S. v. Rose*, __ F.2d __ (7th Cir. June 20, 1990) No. 89-2705.

Offense Conduct, Generally (Chapter 2)

2nd Circuit upholds finding that defendant had extorted over $100,000. (220) After a three day hearing, the district court increased this RICO defendant's guideline level by 6 points *under* section 2C1.1(b)(1) finding him accountable for extorting in excess of $100,000. The 2nd Circuit found that because the government had proved the amount of money by a preponderance of evidence, the finding was not clearly erroneous. The evidence established that the defendant received at least $50 a week from each of the three inspectors whom he supervised during eight years of the conspiracy. The court multiplied this figure by two because it found that the inspectors shared with the defendant approximately half of the bribe money that they extorted. Furthermore, this figure was supported by the defendant's financial statement which evidenced at least $481,000 in unexplained income. *U.S. v. Tillem*, __ F.2d __ (2nd Cir. June 19, 1990) No. 89-1139.

6th Circuit holds that use of toy gun warranted enhancement of offense level. (220)(745) A convicted bank

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robber objected to the trial court's departure from the guidelines after it found that he had used a toy gun during the robbery. The district court found that because the guidelines would require an increase if he had used an actual firearm during the robbery (section 2B3.1(b)(2)), the use of a replica was a concept not addressed by the guidelines, warranting a two level increase in the offense level. The 6th Circuit agreed that this circumstances was not adequately considered by the guidelines which applied to the defendant's offense, noting that the Commission had subsequently amended the guidelines to provide for a three level increase in the offense level if a replica of a dangerous weapon was used. Furthermore, this type of sentencing enhancement did not constitute double counting even though it was a necessary element of the offense of conviction. *U.S. v. Meadwell*, __ F.2d __ (6th Cir. June 12, 1990) No. 89-3658.

1st Circuit affirms firearm enhancement. (284) Six operable firearms were found at defendant's residence, with three loaded and one within arm reach. Also found were 64 grams of cocaine, two surveillance cameras and a camera monitoring the driveway and front of the residence, as well as notebooks describing drug transactions. Based on these facts the 1st Circuit held that a finding that the firearms were connected with a drug offense was not clearly erroneous. *U.S. v. Preston*, __ F.2d __ (1st Cir. June 21, 1990) No. 90-1055.

8th Circuit affirms firearm enhancement because defendant was allowed to rebut uncorroborated hearsay. (284)(770) Defendant's base offense level was increased by two for possession of a firearm during a drug offense. During the police raid, the weapon and drug items were found in the west bedroom. Defendant was arrested in an east bedroom. A confidential informant told police that defendant resided in the west bedroom, and it was this uncorroborated hearsay upon which the district court relied in making the increase. Because defendant was given an opportunity to rebut the evidence connecting him with the firearm, the 8th Circuit affirmed the district court's finding. *U.S. v. Weaver*, __ F.2d __ (8th Cir. June 21, 1990) No. 90-1018.

8th Circuit upholds adjustment for possession of weapon during drug offense where gun was in box with drugs. (284) While executing a search warrant, a detective discovered approximately 585 grams of cocaine and loaded revolver in a metal box underneath a bed. The 8th Circuit held that the presence of the weapon justified an enhancement for possession of firearm during the commission of an offense under section 2D1.1(b)(1). *U.S. v. Baker*, __ F. 2d __ (8th Cir. June 20, 1990) No. 89-2827.

9th Circuit approves enhancement where defendant imported drugs in car with unloaded handgun in trunk. (284) The guidelines provide for a two-point enhancement in offense level for the possession of a firearm during the importation of controlled substances. The commentary to the guidelines preclude the enhancement when the weapon is present during the offense but the weapon's connection to the offense is "clearly improbable." Defendant argued that the enhancement was inappropriately applied to him when an unloaded firearm was found in his trunk near some ammo clips during a border search that also revealed drugs. He claimed to possess the gun as security for a loan that he expected to be paid off on the day he was carrying the gun, but the district judge refused to credit the testimony. Judges Alarcon, Brunetti, and O'Scannlain affirmed the sentencing judge's determination that connection of the gun to the drug offense was not "clearly improbable" even though defendant claimed to possess only a "user's quantity" of drugs; even those dealing in small quantities of drugs sometimes resort to violence, the court noted. *U.S. v. Heldberg*, ___ F.2d ___, 90 D.A.R. 6688 (9th Cir. June 20, 1990) No. 89-50587.

Adjustments (Chapter 3)

1st Circuit holds that "5 or more participants" under 3B1.1(a) includes the "organizer" himself. (430) Defendant argued that once the court found him to be the "organizer or leader," he should not have also been counted as one of the "participants" in the organization under section 3B1.1 of the guidelines. The 1st Circuit disagreed, ruling that the plain language of the guidelines mandates that the organizer be counted as a participant. *U.S. v. Preston*, __ F.2d __ (1st Cir. June 21, 1990) No. 90-1055.

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1st Circuit upholds finding that defendant was an organizer or leader. (430) Defendant exercised a high degree of decision making in organizing cocaine shipments. He also exercised control over four distributors for over a year. He ran the cocaine operation out of his home and was a major retail distributor of cocaine in his local area. Given these facts, the 1st Circuit upheld a district court's conclusion that defendant was the organizer or leader of a drug operation. *U.S. v. Preakos*, __ F.2d __ (1st Cir. June 21, 1990) No. 90-1055.

2nd Circuit finds that RICO defendant was organizer or leader of criminal activity. (430) The 2nd Circuit affirmed a four point enhancement of a RICO role as an organizer of criminal activity under section 3B1.1(a) based upon the evidence at trial which established that the defendant supervised a number of people while extorting money from New York City restaurants in violation of the Hobbs Act. *U.S. v. Tillem*, __ F.2d __ (2nd Cir. June 19, 1990) No. 89-1139.

8th Circuit holds that defendant was a manager or supervisor where he recruited others and set prices. (430) Defendant recruited another person into his methamphetamine conspiracy, was the main contact person between California and Iowa, was able to supply the drug on a regular basis, and set prices for the drug. The district court found that defendant was a manager or supervisor under guideline 3B1.1(b) and increased his base offense level by three. The 8th Circuit affirmed the increase, and commented that recruitment of others and setting of prices are strong support for a conclusion that a defendant is a manager or supervisor. *U.S. v. Pierce*, __ F.2d __ (8th Cir. June 20, 1990) No. 89-2773.

10th Circuit holds that drug courier is not automatically entitled to minor participant adjustment. (440) Defendant was stopped near the border by agents who discovered over 100 pounds of marijuana in his truck. After they found the marijuana, the agents realized that a vehicle that had been stopped just ahead of defendant might have been a scout. Although they found defendant's wallet inside the scout vehicle, they released the individuals. The defendant asserted that because he was a mere courier acting under the control and supervision of the scout vehicle, he was entitled to a minor participant adjustment under section 3B1.2. The 10th Circuit disagreed, finding that because that section turned upon culpability, not courier status, it was not error for the trial court to deny him the adjustment. *U.S. v. Pelayo-Munoz*, __ F.2d __ (10th Cir. June 15, 1990) No. 89-2194.

7th Circuit rejects mitigating role adjustment where defendant recruited others and purchased the cocaine. (440) Defendant argued that it was clearly erroneous for the trial court to deny him a reduction in his offense level under section 3B1.2 based upon his mitigating role in the offense. The 7th Circuit disagreed, finding that the evidence clearly indicated that he was a "important player in the drug conspiracy." He made phone calls and recruited others into the conspiracy and provided the money to purchase the cocaine. Furthermore he was the person who actually distributed the cocaine to an undercover agent. These facts justified a conclusion that the defendant was not a minor or minimal participant in the offense. *U.S. v. Dillon*, __ F.2d __ (7th Cir. June 20, 1990) No. 88-3505.

9th Circuit affirms abuse-of-position enhancement despite minimal effect of officer's conduct. (450) Stopped for questioning in the Los Angeles International Airport, defendant showed investigating agents her police badge in what the sentencing court concluded was an effort to discourage further investigation. The sentencing judge applied the enhancement for "abuse of position of trust" because of defendant's use of her badge. Judge Boochever and Browning rejected defendant's argument that misuse of her badge could not support the enhancement because such use was not a "special privilege" accorded her because of her position. The court also rejected defendant's argument that her lack of success in thwarting the investigation precluded a finding that she had abused her position in a way that "significantly" facilitated her crime; even an unsuccessful attempt can qualify for the enhancement if it makes the crime "significantly . . . easier to commit or conceal." Finally, the court concluded that the sentencing court did not clearly err in assessing defendant's purpose in flashing her badge. Judge Reinhardt dissented from the conclusion that defendant's conduct "significantly" facilitated her offense. *U.S. v. Foreman*, __ F.2d __, 90 D.A.R. 6807 (9th Cir. June 19, 1990) No. 89-50038.

9th Circuit upholds enhancement for bank janitor's abuse of position of trust. (450) Guidelines section 3B1.3 requires a two-level enhancement in the offense level for a defendant who abused a position of trust to facilitate significantly the defendant's crime. The sentencing judge applied the enhancement to defendant, an after-hours janitor for a bank who took traveler's checks from the bank's vault. Judges Hall, Thompson, and Leavy found that characterizing defendant's position as one of trust was not clearly erroneous. The court also rejected defendant's argument that his enhancement was precluded by guidelines commentary exempting bank tellers from the enhancement for embezzlement. Unlike a bank teller, defendant's after-hours access to the bank subjected him to only minimal supervision. Moreover, the court questioned the wisdom of the cited commentary and noted that the commentary is "not binding law," but only "advisory." Although defendant had completed his sentence, his appeal was not moot because the collateral consequences of his sentence persist. *U.S. v. Drabeck*, __ F.2d __, 90 D.A.R. 6641 (9th Cir. June 14, 1990) No. 89-30237.

5th Circuit holds that using an alias during crime did not constitute obstruction of justice. (460) Using an alias, defendant gave a package containing firearms to a federal ex-

press agent for delivery. He did not tell the agent that the package contained firearms. After arrest, he pled guilty to using a common carrier for the interstate transportation of firearms. The district court enhanced his offense level under section 3C1.1 finding that his use of an alias willfully impeded or obstructed justice. The 5th Circuit reversed, finding that there was no evidence to support a finding of obstruction of justice. Defendant did not misrepresent his identity to law enforcement officers; rather he misrepresented it to federal express. His lack of knowledge that any investigation was taking place made it clear that his intent was not to impede an investigation or prosecution. Rather, his intent was to disguise himself, which was a routine precaution any law violator might take. The court found that to countenance such an adjustment would demand its allowance in any case where defendant "wore a mask, disguised his voice, left town, used gloves, and so forth." This was not the type of conduct section 3C1.1 was meant to cover. *U.S. v. Wilson*, __ F.2d __ (5th Cir. June 15, 1990) No. 89-1185.

6th Circuit affirms enhancement for obstruction of justice when defendant perjured himself at suppression hearing. (460) After determining that defendant testified falsely at a suppression hearing, the district court increased defendant's base offense level by two points for obstruction of justice under guideline section 3C1.1. The 2nd Circuit affirmed the enhancement since the district court specifically found defendant's testimony untruthful. The enhancement does not chill the right to testify because a defendant has no right to testify falsify. *U.S. v. Matos*, __ F.2d __ (2nd Cir. June 21, 1990) No. 89-1590.

7th Circuit holds that influencing codefendant's grand jury testimony warranted obstruction of justice adjustment. (460) Defendant was convicted of conspiracy and of making false statements before a grand jury. The district court enhanced his offense level for obstruction of justice after it found that he had provided his codefendant with the script of what to say. The 7th Circuit affirmed the enhancement, ruling that the sentencing court's factual finding that the defendant had taken advantage of codefendant's request for assistance in reconstructing the facts of the offense was not clearly erroneous. The sentencing court found that defendant had actually attempted to influence codefendant's testimony through the use of a "script." *U.S. v. Fozo*, __ F.2d __ (7th Cir. June 14, 1990) No. 89-1528.

7th Circuit holds that providing false name of source of cocaine warranted obstruction of justice adjustment. (460) Shortly after a drug defendant was arrested, he provided a false name to a government agent concerning the source of his cocaine. The following morning he recanted and provided the government with the true source of the cocaine. He argued that the sentencing court therefore erred in enhancing his offense level for obstruction of justice under section 3C1.1. The 7th Circuit disagreed, stating that because the false name that he gave caused the government to expend resources by pursuing the false lead, it was not clearly erroneous for the judge to find that this constituted an obstruction of justice. Furthermore, the defendant received credit for his subsequent recantation by being granted an acceptance of responsibility adjustment. The 7th Circuit found that the defendant was not entitled to a double benefit for this action. *U.S. v. Dillon*, __ F.2d __ (7th Cir. June 20, 1990) No. 88-3505.

8th Circuit upholds obstruction adjustment where defendant tried to flush the cocaine. (460) A detective heard the toilet flush just prior to the defendant's exit from the bathroom. Approximately 580 grams of cocaine was then discovered, most of it in the bathroom. The 8th Circuit held that these actions supported an upward adjustment for obstruction of justice under section 3C1.1 of the guidelines. *U.S. v. Baker*, __ F. 2d __ (8th Cir. June 20, 1990) No. 89-2827.

9th Circuit finds that continued wire fraud from jail cell can justify obstruction-of-justice enhancement. (460) The guidelines call for a two-level upward adjustment in offense level for a defendant who obstructs justice. While in jail awaiting sentencing on wire fraud charges, defendant used his jail telephone to continue his wire fraud activities. Although Judges Thompson, Hall, and Leavy observed that the mere continuation of criminal activity would not justify an obstruction-of-justice adjustment, the court affirmed the adjustment on the facts of defendant's case. Defendant had told his probation officer the extent of his pre-jail criminal activity, and the government was in the process of sorting out the extent of defendant's fraud prior to sentencing. Defendant's continued fraudulent activities complicated the government's investigatory effort and required defendant's probation officer to prepare an addendum to the presentence report. The upward adjustment was not precluded by the fact that defendant's continued criminal activity had already been considered in denying defendant a downward adjustment for acceptance of responsibility. *U.S. v. Lofton*, __ F.2d __, 90 D.A.R. 6645 (9th Cir. June 18, 1990) No. 89-30225.

10th Circuit holds that defendant's expression of remorse was untimely. (480) In his interview with a probation officer, the defendant claimed that he had been unaware that there was marijuana in his van and that he pleaded guilty upon the advice of his lawyer because he believed that there was no possibility of winning at trial. However, at the sentencing hearing he expressed sorrow for what he had done and promised that it would not happen again. The 10th Circuit upheld the district court's denial of acceptance of responsibility adjustment as not clearly erroneous. The district court could not be faulted for finding that the defendant's professed acceptance of responsibility was untimely. Under these circumstances, it was proper to decline to grant the

defendant an adjustment. *U.S. v. Pelayo-Munoz*, __ F.2d __ (10th Cir. June 15, 1990) No. 89-2194.

2nd Circuit rules that defendant need accept responsibility only for "related conduct," not "relevant conduct." (480) The officers alleged that defendant dropped eight additional bags of PCP from his pocket when he was arrested. The defendant disputed this allegation The 2nd Circuit found that the defendant would not be required to accept responsibility for the eight bags of PCP in order to be entitled to an adjustment for acceptance of responsibility. The court distinguished between section 3E1.1's "related conduct" and section 1B1.3's "relevant conduct." Although a sentencing court may consider all relevant conduct in determining the offense level, it cannot require a defendant to accept responsibility for all relevant conduct. To impose a such a requirement would raise distinct 5th Amendment questions. However, the case was remanded because the record was not clear as to the basis for the district court's denial of the adjustment for acceptance of responsibility. *U.S. v. Oliveras*, __ F.2d __ (2nd Cir. June 4, 1990) No. 89-1380.

2nd Circuit rules that requiring acceptance of responsibility for dismissed counts violated 5th Amendment. (480) Defendant argued that the trial court violated his 5th Amendment rights against self-incrimination by requiring him to accept responsibility for counts which had been dismissed as part of his plea agreement. The 2nd Circuit agreed, finding that unless defendant's statements were immunized from use in subsequent criminal prosecutions, the effect of requiring him to accept responsibility for crimes other than those to which he pled guilty or which he had been found guilty constituted a penalty for refusing to incriminate himself in violation of the 5th Amendment. The court found that just because the prosecution had agreed to dismiss counts did not remove the risk of self incrimination posed by admissions made to a probation officer. Additionally, a reasonable interpretation of guideline section 3E1.1(a) and its 1988 amendment supported this interpretation. *U.S. v. Oliveras*, __ F.2d __ (2nd Cir. June 4, 1990) No. 89-1380.

8th Circuit holds that acceptance of responsibility does not require that plea be accompanied by affirmative act. (480) Defendant's plea agreement stipulated to a two point reduction for acceptance of responsibility and candidness and cooperation with the probation officers. The district court refused to grant the reduction, ruling that a plea of guilty without other affirmative acts was insufficient to justify a reduction. The 8th Circuit reversed, holding such an interpretation of guideline section 3E1.1 would penalize those caught red-handed or those who wished to consult an attorney before pleading guilty. The court wrote that the district court retains discretion to grant a reduction if it believed defendant demonstrated a recognition and affirmative responsibility as well as sincere remorse for his crime. *U.S. v. Knight*, __ F.2d __ (8th Cir. June 1, 1990) No. 89-1799.

1st Circuit finds that no acceptance of responsibility where defendant did not admit involvement. (485) Defendant argued that the district court erred in declining to grant him a reduction in his offense level for acceptance of responsibility. The 1st Circuit disagreed, noting that the defendant had yet to truthfully admit and describe his involvement in the offenses of conviction. The court found that acceptance of responsibility "necessitates candor and authentic remorse, nor merely a pat recital of the vocabulary of contrition," which was all the defendant had done in this case. The reduction was properly denied. *U.S. v. Garcia*, __ F.2d __ (1st Cir. June 19, 1990). No. 89-1955.

2nd Circuit finds RICO defendant not entitled to acceptance of responsibility due to his denial of guilt. (485) Defendant claimed he should be resentenced because the district court erroneously declined to grant him an acceptance of responsibility adjustment. The 2nd Circuit disagreed, finding that the defendant had expressed "no contrition during the sentencing hearing," repeatedly asserting that he never extorted any money despite the overwhelming evidence of guilt. *U.S. v. Tillem*, __ F.2d __ (2nd Cir. June 19, 1990) No. 89-1139.

8th Circuit finds no acceptance of responsibility where defendant tried to justify her drug dealing. (485) Defendant claimed that the trial court erred in failing to reduce her offense level by two points for acceptance of responsibility under section 3E1.1. The 8th Circuit disagreed, finding that the defendant's refusal to supply information about others and the failure to acknowledge the sizable quantity of drugs justified the enhancement. The court also found that the defendant attempted to justify her drug dealing by stating it was her only means of supporting her children. The court found that these statements did not indicate sincere remorse for her actions. *U.S. v. Baker*, __ F. 2d __ (8th Cir. June 20, 1990) No. 89-2827.

Criminal History (§ 4A)

7th Circuit finds that resisting arrest and battery on a police officer justifies one criminal history point. (500) Drug defendant received one criminal history point because he had pled guilty to resisting arrest and battery upon a police officer. The 7th Circuit found that although the resisting arrest conviction was similar to an offense which is exempted from criminal history under section 4A1.2(c)(1), the battery aspect of his prior conviction was not. Thus, the exemption was not applicable and he was correctly assessed one criminal history point. *U.S. v. Dillon*, __ F.2d __ (7th Cir. June 20, 1990) No. 88-3505.

7th Circuit holds that bench warrant for failure to pay DUI fine did not warrant enhancement of criminal history. (500)

In sentencing a drug conspirator the district court enhanced his criminal history level by two points under section 4A1.1(d) after finding that the defendant had a bench warrant outstanding due to his failure to pay a fine following a DUI conviction. The 7th Circuit held that the existence of the bench warrant did not constitute a "criminal justice sentence" under section 4A1.1(d) of the guidelines. Under state law, the state would have been justified in seeking the issuance of a bench warrant during the defendant's probationary period. However, the bench warrant was not issued until after the one year probationary term had expired. Because the "sentence of court supervision" had expired, the defendant was not under a criminal justice sentence when the federal drug offense occurred, and the sentencing court had no authority to increase his criminal history points. The 7th Circuit did note that the defendant's fugitive status may have constituted a ground for departure, but this was not considered by the sentencing court. *U.S. v. Dillon*, __ F.2d __ (7th Cir. June 20, 1990) No. 88-3505.

10th Circuit finds that second degree burglary qualifies as crime of violence under career offender guideline. (520) Defendant asserted that his two prior Missouri State convictions for second degree burglary were not crimes of violence because they did not require as an element of the offense that an innocent person be present in the structure or that a physical injury occur. The 10th Circuit disagreed, finding that whether an offense constitutes a crime of violence is a question of federal law and therefore the court may look beyond the elements of the offense. The court agreed with three other circuit courts that have addressed the issue, holding that burglary of a dwelling is a crime of violence within the career offender section. To hold otherwise would frustrate the guidelines policy of uniformity in sentencing by allowing criminals with similar records to receive vastly different sentences simply because their past crimes were defined differently by different states. *U.S. v. Brunson*, __ F.2d __ (10th Cir. June 19, 1990) No. 89-3176.

1st Circuit holds that bank robbery by force and violence is a crime of violence within the career offender guideline. (520) Defendant pled guilty to bank robbery by force and violence or by intimidation in violation of 18 U.S.C. section 2113(a). The 1st Circuit held that it was beyond dispute that the career offender guideline definition of crime of violence applied to this offense. The offense by its nature involved a substantial risk that physical force may be used against a victim and also presented a serious potential risk of physical injury to another. Even if the offender does not intend to carry out his threat, his victim may fear his threat and take actions which would cause the offender to react violently. The defendant's conduct, which was typical of robbery, clearly involved the substantial or serious risk of physical force or injury. *U.S. v. McVicar*, __ F.2d __ (1st Cir. June 14, 1990) No. 89-1377.

1st Circuit holds that conviction of larceny from the person was a crime of violence under career offender guideline. (520) Defendant who had pled guilty to bank robbery asserted that his prior state law conviction for "larceny from the person" should not have counted as a crime of violence under the career offender guidelines. The 1st Circuit disagreed, finding that even though no threat of violence was involved, the risk of physical injury was serious because even a pickpocket can cause a reaction from his victim which might lead to more serious consequences. *U.S. v. McVicar*, __ F.2d __ (1st Cir. June 14, 1990) No. 89-1377.

9th Circuit concludes that unarmed robbery constitutes crime of violence under career criminal section. (520) Guidelines section 4B1.1 increases the sentence of defendants who are career criminals, a determination that turns in part on whether past offenses were crimes of violence. Defendant argued that his two prior convictions for bank robbery under 18 U.S.C. section 2113(a) should not be counted as crimes of violence because he neither carried a gun nor harmed anyone during the robberies. Judges Schroeder, Hug, and Skopil disagreed. Noting with disapproval that defendant's argument would require sentencing courts to hold "satellite factual hearings" on the facts underlying past convictions, the court instead analyzed the case by reviewing the statute of conviction for congruence with the guidelines requirement that a crime of violence have as "an element the use, attempted use, or threatened use of physical force against the person of another." Because 18 U.S.C. section 2113(a) required force, violence, or intimidation to support conviction, the statute defines a crime of violence. The sentencing court discharged its rule 11 responsibilities by advising defendant of the maximum statutory penalty for his crime, even though the court did not advise defendant that he might be sentenced as a career criminal. *U.S. v. Selfa*, ___ F.2d ___, 90 D.A.R. 6643 (9th Cir. June 14, 1990) No. 89-10309.

Determining the Sentence (Chapter 5)

10th Circuit upholds consecutive sentences where statutory factors were satisfied. (660) Defendant was convicted of bank fraud, interstate transportation of stolen property, conspiracy to commit fraud, and falsely representing her social security number. The court ordered the sentence for transporting stolen property to run consecutively to the conspiracy sentence. On appeal, the 10th Circuit affirmed, noting that the trial court imposed the consecutive sentences only after clearly taking into account the factors set forth in 18 U.S.C. section 3553(a). No error occurred. *U.S. v. Russell*, __ F.2d __ (10th Cir. June 20, 1990) NO. 89-6142.

5th Circuit upholds guideline sentence ordered to run consecutively to preguideline sentence. (660) Defendant was

convicted of obstructing justice, an offense which was subject to sentencing under the guidelines. He was also convicted of filing a false tax refund claim, which was committed before the effective date of the guidelines. The 5th Circuit found no abuse of discretion in ordering each sentence to run consecutively to the other. The court noted, however, that it would have been "more in keeping with the intent of the Sentencing Reform Act" to impose the sentence on the conspiracy count consecutively *only* to the extent necessary to adequately punish the defendant based upon dual convictions arising from the same underlying acts. *U.S. v. Garcia*, __ F.2d __ (5th Cir. June 6, 1990) No. 89-7074.

10th Circuit rules that prevalence of alcohol abuse on an Indian reservation is not grounds for downward departure. (690)(722) The district court refused to depart downward because it believed that the prevalence of alcohol on an Indian reservation was not a basis for departure. The 10th Circuit agreed, holding that the prevalence of alcohol abuse and race are not grounds for departure. *U.S. v. Lowden*, __ F.2d __ (10th Cir. June 20, 1990) No. 89-2052.

Departures (§ 5K)

10th Circuit gives "due deference" to trial judge in determining reasonableness of extent of departure. (700)(820) The 10th Circuit held that in reviewing the reasonableness of the extent of an upward departure from criminal history category VI, a district court is entitled to "due deference." An appellate court should not "lightly overturn determinations of the appropriate degree of departure." The court found that the Commission did not intend to impose a particular formula upon a sentencing judge, but judges should not disregard the guideline requirements of proportionality and uniformity in making their determinations. *U.S. v. Russell*, __ F.2d __ (10th Cir. June 20, 1990) NO. 89-6142.

10th Circuit holds that departure from criminal history category VI is guided only by court's own judgment. (700)(730) After finding that criminal history category VI underrepresented defendant's criminal history, the district court imposed the statutory maximum sentence, which was almost three times the guideline range. The 10th Circuit found that the Sentencing Commission had provided no guidance for determining the reasonableness of departures where criminal history category VI underrepresented defendant's criminal history. Accordingly, the court held that it was required to "simply use its own judgment as to whether the sentence imposed was proportional to the crime committed in light of the past criminal history." The court found that this case stretched proportionality to the limit, but that this was ameliorated by the fact that the sentence was ordered to run concurrently to a state prison sentence. Seen in context, the statutory maximum sentence did not violate the sentencing guidelines proportionality requirements since the defendant had been defrauding people nearly his entire adult life. *U.S. v. Bernhardt*, __ F.2d __ (10th Cir. June 11, 1990) No. 89-6323.

10th Circuit holds that reasonableness of departure from criminal history category VI depends upon whether uniformity and proportionality will be preserved. (700)(730) The 10th Circuit ruled that determining the reasonableness of an upward departure beyond criminal history category VI requires regard for the factors in 18 U.S.C. section 3553, including uniformity and proportionality. The district court must clearly articulate its reasons for the extent of the departure in order to enable the appellate court to effectively supervise the sentencing process and enforce the principles of uniformity and proportionality implicit in the concept of reasonableness. In the present case, the sentencing court adequately articulated the reasons behind its choice of sentence. The 10th Circuit emphasized that "the district judge retains discretion to select an appropriate methodology or rationale to set an enhanced sentence so long as it is not inconsistent with the guideline objectives of uniformity and proportionality." *U.S. v. Gardner*, __ F.2d __ (10th Cir. June 18, 1990) No. 89-6289.

10th Circuit reverses unguided criminal history departure. (700)(730) Defendant pled guilty to aiding and abetting wire fraud. Defendant had seven prior felony fraud convictions, as well as numerous misdemeanor convictions for fraud offenses, placing him in criminal history category IV. The district court departed upwards from a guideline range of 15 21 months and sentenced defendant to 40 months in prison. The 10th Circuit reversed. Although the aggravating circumstances of defendant's past were not adequately considered by the guidelines, the unguided departure was held to be unreasonable. On remand the district court was ordered to use a higher criminal history category as a guide for departure, and to articulate reasons for degree of departure. *U.S. v. Harris*, __ F.2d __ (10th Cir. June 21, 1990) No. 89-5113.

10th Circuit holds that it can review refusal to depart downward if district court erroneously believes it is forbidden to depart downward. (700)(810) The district court stated that it believed it was powerless to depart and therefore refused to do so. The 10th Circuit held that it had "jurisdiction to review this decision because a sentence imposed within the guideline range only because the court erroneously believed that the guidelines did not permit a downward departure is a sentence imposed as a result of an incorrect application of the sentencing guidelines." *U.S. v. Lowden*, __ F.2d __ (10th Cir. June 20, 1990) No. 89-2052.

2nd Circuit reverses downward departure even though minimally culpable offenders are not in a position to provide "substantial assistance" to the government. (710)(72 Although it agreed with the district judge that it was

"troubling" that minimally culpable offenders often do not have the quantity or quality of information to justify a substantial assistance departure under section 5K1.1, the 2nd Circuit reversed the judge's downward departure. No motion was made by the government. Nor did the requirement of a government motion under section 5K1.1 lodge too much discretion in United States Attorneys. Although the defendant had identified a drug dealing location to the government and provided the government with information on his supplier (who had died before the information became of any use), the court found that this case did not "present the rare case that involves circumstances that were not adequately taken into consideration by the Sentencing Commission." Despite their empathy for the judge who attempted to infuse equity into the guidelines, the court found that its "hands were tied." *U.S. v. Reina*, __ F.2d __ (2nd Cir. June 4, 1990) No. 90-1007.

8th Circuit holds that district court' refusal to grant substantial assistance departure is not reviewable on appeal. (710)(810)) Defendant agreed after the trial to cooperate in the government's investigation of drug trafficking. He asserted that he made a good faith effort to provide substantial assistance to the government, and claimed that the district court therefore erroneously refused to reduce the sentence under section 5K1.1. The 10th Circuit held that the district court's refusal to depart under that section was nonreviewable and even if it were that the court had no authority to even consider a downward departure because the government had not made a motion as required by that section. However, the court noted that a motion by the government may not be necessary if the government's refusal to make such a motion had violated the defendant's right to due process, a claim which was not alleged in this case. *U.S. v. Dobynes*, __ F.2d __ (8th Cir. June 15, 1990) No. 89-2378.

New York District Court departs downward where no community confinement facility was available. (721) Judge Restami of the Southern District of New York originally sentenced defendant to four months community confinement. However, the defendant was pregnant, and no facility would accept her. Two months after the birth of the child there was still no facility available. Accordingly, the judge departed downward, stating that "the guidelines did not address the unavailablility of facilities for women in general and for pregnant women in particular." The sentence was modified to provide for community confinement "at the discretion of the probation department if defendant's adjustment to the community deteriorates, and upon notification to the court." *U.S. v. Reyes*, __ F.Supp. __ (S.D.N.Y. June 6, 1990) No. 89-CR 655(JAR).

2nd Circuit holds that downward departure to avoid severe penalty for crack cocaine required reversal. (722) The district court departed downward in a drug case because it found that the penalties for distribution of crack cocaine were more severe than for distribution of normal cocaine. The government appealed and the 2nd Circuit reversed. It found that "a downward departure cannot be fashioned because the penalties are more severe." Congress had enhanced the penalties for crack cocaine specifically to deter what it found to be insidious drug transactions, including those involving the highly addictive form of cocaine base known as crack. *U.S. v. Reina*, __ F.2d __ (2nd Cir. June 4, 1990) No. 90-1007.

4th Circuit reverses downward departure for family ties although defendant was sole custodial parent. (722) The district court departed downward because defendant was the sole, custodial parent of two children who would be forced to live with strangers if she were imprisoned. The district court held that such a separation would have a devastating impact on the children, and therefore imposed probation in lieu of the 10 month prison term mandated by the guidelines. The government appealed and the 4th Circuit reversed, ruling that the district court's finding that the situation was extraordinary was clearly erroneous. The court wrote that a sole custodial parent is not a societal rarity, and the separation caused by imprisonment was not extraordinary. "[The defendant] has shown nothing more than that which innumerable parents could no doubt establish: namely, that the imposition of prison sentences normally disrupts spousal and parental relationships . . . " *U.S. v. Brand*, __ F.2d __ (4th Cir. June 21, 1990) No. 89-5213.

10th Circuit finds criminal history departure beyond category VI was warranted. (733) In sentencing a defendant for various offense arising from a fraudulent scheme, the district court departed upward from the appropriate guideline range by 14 months on the ground that criminal history category of VI did not adequately represent the defendant's criminal history. The 10th Circuit upheld the departure, finding that (1) because 16 separate convictions were consolidated for sentencing, only three criminal history category points were assessed (section 4A1.2 comment 3); (2) the defendant committed the instant offense while other charges were still pending (section 4A1.3(d)); and (3) seven charges of passing worthless check were dismissed after the defendant made restitution to the victims (section 4A1.3(e)). These reasons provided ample justification for the upward departure according to the guidelines themselves. *U.S. v. Russell*, __ F.2d __ (10th Cir. June 20, 1990) NO. 89-6142.

10th Circuit holds that 25 criminal history points plus several uncounted prior convictions justified upward departure. (733) In sentencing a defendant who had deposited a forged check into a bank account, the district court departed upward on the ground that his 25 criminal history points were 12 more than the maximum for criminal history category VI. In addition, several of his prior convictions were not even counted. This lifelong pattern of conduct fully justified a departure from the 18-24 guideline range to the

statutory maximum sentence of 5 years imprisonment. The court found that a factual basis existed for the departure and that the extent of the departure was reasonable. *U.S. v. Bernhardt*, __ F.2d __ (10th Cir. June 11, 1990) No. 89-6323.

10th Circuit upholds criminal history departure from category VI based upon old convictions. (733) Defendant pled guilty to bank robbery by force and the district court departed upward to 210 months in prison. This was nearly double the guideline sentence. On appeal, the 10th Circuit affirmed, stating that the district court properly found that the four prior convictions which could be counted did not adequately represent the defendant's actual criminal history. The defendant had several additional convictions that were not counted because they were more than 15 years old (see section 4A1.2(e)). These two prior convictions for similar criminal conduct outside of the 15 year limit warranted departure. The court found that there was a clear factual basis for the departure and that the extent of the departure was reasonable. *U.S. v. Gardner*, __ F.2d __ (10th Cir. June 18, 1990) No. 89-6289.

10th Circuit upholds criminal history departure where defendant "closely resembled" a career offender. (733) The 10th Circuit noted that defendant's criminal history suggested that robbery was his chosen profession, but two of his convictions were too old qualify him for career offender status. Nevertheless, his criminal history "closely resembled" that of a career offender. Accordingly, the 10th Circuit found that the district court's decision to depart upward and sentence him by reference to the career offender provisions was reasonable, "particularly where, as here, the district court chose to sentence him to the lower range for a career offender." *U.S. v. Gardner*, __ F.2d __ (10th Cir. June 18, 1990) No. 89-6289.

6th Circuit upholds criminal history departure where three prior robberies were prosecuted as one. (733) In sentencing a convicted bank robber, the district court departed upward from criminal history category III to category VI. Although the defendant had only one prior felony conviction on his record, that conviction was related to three separate bank robberies committed on three separate occasions over a period of about eight months. Had these crimes been considered separately, the defendant might have been classified as a career offender, and automatically assigned a category VI criminal history. The 6th Circuit found that the judge was justified in finding that neither criminal history categories IV nor V adequately represented the defendant's actual criminal history. Category VI was therefore appropriate. *U.S. v. Medved*, __ F.2d __ (6th Cir. June 12, 1990) No. 89-3658.

Sentencing Hearing (§ 6A)

8th Circuit says it has not adopted preponderance of the evidence as standard for proving facts at sentencing. (755) The 8th Circuit rejected defendant's contention that it had adopted the "preponderance of the evidence" standard for proving facts at sentencing. Although the court noted that it had approved of the standard in *U.S. v. Sleet*, 893 F.2d 94 (8th Cir. 1989), it wrote that such approval was only a recognition that the Supreme Court had ruled such a standard does not violate due process. The court held that "it is sufficient that the district court's findings are 'adequate for us to make a meaningful review.'" (citing *U.S. v. Luster*, 896 F.2d 1122 (8th Cir. 1990). *U.S. v. Weaver*, __ F.2d __ (8th Cir. June 21, 1990) No. 90-1018.

6th Circuit reverses because judge failed to resolve factual dispute at sentencing. (770) The 6th Circuit reversed defendant's sentence because the district court failed to make an express finding on the disputed evidence, and it was clear that the disputed evidence had been relied on in sentencing. The court pointed out that defendant was entitled to resentencing under Rule 32(c)(3)(D) even though he did not allege a due process violation. Thus he did not have to raise "grave doubt" as to the veracity of the information. *U.S. v. Mandell*, __ F.2d __ (6th Cir. June 22, 1990) No. 89-3197.

9th Circuit holds that disputed facts at sentencing require findings by sentencing judge under Fed. R. Crim. P. 32. (772) At sentencing, defendant challenged the factual accuracy of matters contained in the presentence report. The district court failed by make the findings or determinations required by Fed. R. Crim. P. 32(c)(3)(D). Judges Beezer, Pregerson, and Canby found that this omission mandated resentencing. Although defendant did not raise his Rule 32 objection before the district judge, the court reviewed the claim because no factual inquiry was necessary, the challenged information was important to sentencing and continued to affect the defendant's treatment during later stages of the correctional process, and the failure of the district court to follow Rule 32 constituted clear error. *U.S. v. Bigman*, ___ F.2d ___, 90 D.A.R. 6646 (9th Cir. June 18, 1990) No. 88-1703.

Plea Agreements, Generally (§ 6B)

6th Circuit allows withdrawal of plea where base offense level was higher than provided in plea. (790) Defendant pled guilty to distributing marijuana. The plea agreement allowed defendant to withdraw his plea if the district court departed from the agreed base offense level of 20 or departed from the otherwise applicable criminal history category. Based on an addendum indicating that defendant distributed drugs on other occasions, the district court increased defendant's base offense level, although the sentence still fell within the range stated in the plea agreement. The 6th Circuit reversed, holding that defendant was entitled to

specific performance of his plea bargain. Even though the sentence fell within the appropriate range, the defendant had to be sentenced by the agreed method or be allowed to withdraw his plea. *U.S. v. Mandell*, __ F.2d __ (6th Cir. June 22, 1990) No. 89-3197.

Appeal of Sentence (18 USC 3742)

9th Circuit finds threat to seek death penalty undermined waiver of appeal and counsel. (800)(860) After certain sentencing proceedings, if a trial judge refuses to impose the death penalty, imposition of the death penalty after appeal is barred by the double jeopardy clause. Petitioner was sentenced to life imprisonment after such a proceeding. On appeal, the Arizona Supreme Court remanded petitioner's case to the trial court for an evidentiary hearing on whether petitioner understood the nature of the charges against him when he entered his plea. Petitioner dropped his appeal and waived counsel after being informed by state officials that he might ultimately be sentenced to death if he persisted. Senior Judge Lively and Judges Fletcher and Reinhardt found petitioner's waivers inadequate under the due process clause because they were motivated by a threat that the state was powerless to enforce. Accordingly, the court ordered that petitioner's appeal be reinstated, and that petitioner be appointed counsel. *Cuffle v. Goldsmith*, ___ F.2d ___, 90 D.A.R. 6655 (9th Cir. June 15, 1990) No. 89-15537.

2nd Circuit holds that discretionary decisions not to depart are not reviewable on appeal. (810) The 2nd Circuit ruled that it had no jurisdiction to review a district court's discretionary decision not to depart from the guidelines based upon a defendant's failing physical condition. It held that based upon prior authority, discretionary decisions not to depart are unreviewable on appeal. *U.S. v. Tillem*, __ F.2d __ (2nd Cir. June 19, 1990) No. 89-1139.

7th Circuit holds that overlapping guideline ranges made resentencing unnecessary. (810) Although it found that the sentencing court had erroneously calculated the defendant's criminal history level, the 7th Circuit ruled that because the sentence actually imposed fell within the correct range there was no need to remand the case for resentencing. The court relied upon the Guidelines, Chapter One, Part A, Introduction 4(h), which stated that the overlapping of the ranges was intended to "discourage unnecessary litigation." The court found that it was unnecessary to resolve disputes as to which offense level would be correct as long as it was reasonable to conclude that the same sentence would have been imposed irrespective of the outcome of the dispute. The court found that in this case, it was reasonable to assume that the sentence imposed would have been the same under either of the two ranges. *U.S. v. Dillon*, __ F.2d __ (7th Cir. June 20, 1990) No. 88-3505.

Death Penalty

Supreme Court holds Caldwell v. Mississippi inapplicable to convictions final before its decision. (860) On habeas corpus, a rule announced after a conviction becomes final generally cannot be used to attack that conviction if the rule is new. Defendant argued that the Court did not announce a new rule when it decided in *Caldwell v. Mississippi* that the death sentence may not be imposed by a sentencer that has been led to the false belief that the responsibility for determining the appropriateness of the defendant's capital sentence rests elsewhere. Justice Kennedy, writing for five members of the Court, held that *Caldwell* did announce a new rule, and accordingly could not be used to attack defendant's conviction. The Court concluded that *Caldwell* was not "dictated by precedent" existing when defendant's conviction became final--i.e., when his direct appellate remedies were exhausted. Focusing on the "reasonableness" of the state court's refusal to anticipate *Caldwell*, the Court noted that the most closely analogous case to *Caldwell* had involved the due process clause while *Caldwell* itself was decided on eighth amendment grounds. The Court also held that Caldwell did not represent a "'watershed rule[] of criminal procedure' . . . necessary to the fundamental fairness of the criminal proceeding." Justices Marshall, Brennan, Blackmun, and Stevens dissented. *Sawyer v. Smith*, ___ U.S. ___, 90 D.A.R. 7074 (June 21, 1990).

Forfeiture Cases

10th Circuit holds that criminal forfeiture trial need not be bifurcated where defendant fails to state a desire to testify at a separate trial. (920) In *U.S. v. Sandini*, 816 F.2d 869 (3rd Cir. 1987) the 3rd Circuit exercised its supervisory power to require complete bifurcation of in personam criminal forfeiture proceedings from the guilt phase of a criminal trial. On the other hand, in *U.S. v. Perholtz*, 842 F.2d 343 (D.C. Cir. 1988), the D.C. Circuit declined to adopt a rule requiring any bifurcation whatsoever, and the 9th Circuit declined to rule on the constitutionality of unitary proceedings in *U.S. v. Feldman*, 853 F.2d 648, 661 (9th Cir. 1988). Here, the 10th Circuit held that the responsibility rests on the defendant and counsel to make the trial court aware that the defendant desires to testify on the forfeiture issues. "If no such request is made, the trial court and the government are entitled to assume that evidence concerning guilt and forfeiture may be heard together." *U.S. v. Jenkins*, __ F.2d __ (10th Cir. May 31, 1990) No. 87-1797.

CIVIL DIVISION ATTORNEYS
WITH EXPERTISE IN DESIGNATED AREAS

Prepared By The
Office Of Management Information
Office of Management Programs
Civil Division

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Fraudulent Transfers	Ruth Harvey	307-0388
	Robert M. Hollis	307-0387
	Linda Samuel	514-7162
Garnishments	John W. Showalter	307-0244
Insolvency Proceedings	John T. Stemplewicz	307-1104
	Tracy J. Whitaker	307-0228
Judgment Enforcement	Ruth Harvey	307-0388
	Linda Samuel	514-7162
Medicare Insurance Company Insolvencies	Sandra P. Spooner	514-7194
Medicare Overpayments	Robert M. Hollis	307-0387

National Service Life Insurance Receivers	Linda Samuel Ruth Harvey Robert M. Hollis	514-7162 307-0388 307-0387
Reorganizations	John T. Stemplewicz Tracy J. Whitaker	307-1104 307-0228
Servicemen's Group Life Insurance	Linda Samuel	514-7162
Student Loan Defaults	John W. Showalter	307-0244
Transportation Claims (Elkins Act, I.C.C. Reparations)	Richmond McKay	307-0234
Veterans Reemployment	John W. Showalter	307-0244

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FOREIGN LITIGATION

Director
David Epstein 514-7455

Areas of Expertise

Foreign Litigation	David Epstein David M. Schlitz	514-7455 307-0983
International Judicial Assistance (Service of Proces and Evidence)	David Epstein David M. Schlitz	514-7455 307-0983

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FRAUD

Director
Michael F. Hertz 514-7179

Assistant Directors

Stephen D. Altman	307-0197
Joyce R. Branda	307-0231
Polly A. Dammann	307-1183
Howard L. Sribnick	307-0189

Areas of Expertise

Bribery	Michael F. Hertz	514-7179
Civil Investigative Demands	Stephen D. Altman	307-0197
Civil Use of Grand Jury Materials (Rule 6(d))	Stephen D. Altman	307-0197

Defective Pricing	Howard L. Sribnick	307-0189
Department of Defense Voluntary Disclosure Program	Joyce R. Branda Michael F. Hertz	307-0231 514-7179
False Claims Act	Joyce R. Branda Michael F. Hertz Howard L. Sribnick	307-0231 514-7179 307-0189
Inspector General Subpoenas	Joan E. Hartman	307-6697
Loan Fraud	Stephen D. Altman	307-0197
Medicare/Medicaid Fraud	Ron Clark	307-0263
Official Corruption/Conflict of Interest (Civil Actions)	Michael F. Hertz	514-7179
Qui Tam Cases	Joyce R. Branda Michael F. Hertz	307-0231 514-7179
United States v. Halper (double jeopardy)	Stephen D. Altman	307-0197

* * * * *

INTELLECTUAL PROPERTY

Director

Vito J. DiPietro 514-7223

Assistant Directors

Thomas J. Byrnes 307-0285
John J. Fargo 307-0458

Areas of Expertise

Patent, Trademark and Copyright Law	Thomas J. Byrnes Vito J. DiPietro John Fargo	307-0285 514-7223 307-0458

* * * * *

FEDERAL PROGRAMS BRANCH

Deputy Assistant Attorney General
Leslie H. Southwick 514-5421

Directors
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Dennis G. Linder 514-3314
Brook Hedge 514-3501

Special Litigation Counsel
Neil H. Koslowe 514-3418

Case Locator
William Wiggins 514-4780

AREA 1: REGULATORY ENFORCEMENT (AFFIRMATIVE LITIGATION)

Director
David J. Anderson 514-3354

Assistant Director
Richard C. Stearns 514-3331

Areas of Expertise

Department of Agriculture Litigation	Paul Bridenhagen	514-4781
Department of Energy Litigation	Marcia Sowles	514-4960
Employment Retirement Income Security Act (ERISA)	Tom Millet	514-3403
Federal Emergency Management Agency (FEMA) Flood Insurance	Karen Stewart	514-2849
Financial Institution Litigation	Bonnie Osler	514-3770
Interstate Land Sales Full Disclosure Act	Peggy Hewing Wendy Kloner	514-3481 514-3489
Subpoena Enforcement	Terry Henry	514-4107

AREA 2: NON-DISCRIMINATION PERSONNEL LITIGATION (PRIMARILY ADVERSE PERSONNEL ACTIONS)

Director
Brook Hedge 514-3501

Assistant Director
Mary Goetten 514-4651

Areas of Expertise

Adverse Personnel Actions	Mary Goetten Brook Hedge	514-4651 514-3501
Civil Drug Testing Issues	Mary Goetten	514-4651
Civil Service Reform Act	Mary Goetten	514-4651
General Personnel Issues	Mary Goetten	514-4651
Removal of Officers of the U.S.	Mary Goetten	514-4651

AREA 3: GOVERNMENT INFORMATION (FOIA, PRIVACY ACT)

Director		Assistant Director	
David J. Anderson	514-3354	Elizabeth A. Pugh	514-3178

Areas of Expertise

Federal Advisory Committee Act	Mona Butler	514-3374
	Elizabeth Pugh	514-3178
Freedom of Information Act (FOIA)	Susan Korytkowski	514-4504
	James Kovakas	514-2336
	Tracy Merritt	514-3486
	Elizabeth Pugh	514-3178
Privacy Act	Richard Brown	514-5751
	Elizabeth Pugh	514-3178
Reverse FOIA Cases	Elizabeth Pugh	514-3178
Right to Financial Privacy Act	Drake Cutini	514-4290
Third-Party Subpoena Matters	Drake Cutini	514-4290
	Elizabeth Pugh	514-3178

AREA 4: HUMAN RESOURCES (PRINCIPALLY DEPARTMENTS OF HEALTH AND HUMAN SERVICES, EDUCATION)

Director		Assistant Director	
Brook Hedge	514-3501	Sheila M. Lieber	514-3786

Areas of Expertise

Aliens' Entitlement to Benefits	Karen Stewart	514-2849
Medicare	Richard Lepley	514-3492
National Health Scholarship	Anne Weismann	514-4469
Social Security	Brian Kennedy	514-3357

AREA 5: HOUSING AND COMMUNITY DEVELOPMENT (PRINCIPALLY HUD, FmHA AND FEMA)

Director		Assistant Director	
Dennis G. Linder	514-3314	Arthur R. Goldberg	514-4783

Areas of Expertise

Fair Housing	Arthur R. Goldberg	514-4783
FmHA Mortgage Foreclosure	Arthur R. Goldberg	514-4783
Housing and Urban Development (HUD)		
-- General Litigation	Arthur R. Goldberg	514-4783
-- Operating Subsidy	Stuart Licht	514-4265
	Renee Wohlenhaus	514-2205
McKinney Act/Homeless Issues	Mary Magee	514-4505
National Flood Insurance Act	Drake Cutini	514-4290
	Karen Stewart	514-2849
National Flood Insurance Act --	Arthur R. Goldberg	514-4783
Flood Elevation Determinations	Ken Kohl	514-3183
Public Housing - Drug Related Evictions	Tony Coppolino	514-4782
Rent Adjustment Issues (Section 8)	Brian Kennedy	514-3357
	Wendy Kloner	514-3489
	James Portnoy	514-1280

AREA 6: NATIONAL SECURITY AND FOREIGN RELATIONS

Director		Deputy Director	
David J. Anderson	514-3354	Vincent M. Garvey	514-3449

Areas of Expertise

Classified Information -- FOIA	Richard Lepley	514-3492
Military Discharge	Drake Cutini	514-4290
National Security -- Protecting Information in Third-Party Matters	David Glass	514-1275
Privilege Claims	David Glass	514-1275

AREA 7: AGRICULTURE, ENERGY AND INTERIOR

		Assistant Director	
.is Linder	514-3314	Stephen Hart	514-3313

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Areas of Expertise

Department of Agriculture Marketing Order	Stuart Licht Michael Sitcov	514-4265 514-1944
Department of Energy		
-- Consent Order Litigation	Judry Subar	514-3969
-- General Litigation	Marcia Sowles	514-4960
Food Stamp Litigation	Susan Korytkowski Renee Wohlenhaus	514-4504 514-2205
Federal Hydroelectric Projects -- Marketing and Pricing of Power	C. Max Vassanelli	514-4776

AREA 8: FOREIGN AND DOMESTIC COMMERCE (INCLUDES COMMERCE, LABOR, TREASURY AND TRANSPORTATION DEPARTMENTS)

Director		Assistant Director	
Dennis G. Linder	514-3314	Sandra Schraibman	514-3315

Areas of Expertise

Bureau of Census Litigation	Susan Korytkowski Sandra Schraibman	514-4504 514-3315
Census Adjustment Litigation	Steve Hart	514-3313
Court-Ordered Promulgation of New Regulations	Sandra Schraibman	514-3315
Davis-Bacon Act	Ray Larizza	514-4770
Firearms Litigation	Jeff Gutman	514-4775
Labor Department H-2A Alien Farm Worker Program	Drake Cutini Judry Subar	514-4290 514-3969
Paperwork Reduction Act	Sandra Schraibman	514-3315
Regulatory Flexibility Act	Sandra Schraibman	514-3315
Treasury Department -- Foreign Assets Control	Anne Weismann	514-4522

AREA 9: GOVERNMENT CORPORATIONS AND REGULATORY AGENCIES (INCLUDES VA, GSA, OMB)

Director		Assistant Director	
Brook Hedge	514-3501	Ted Hirt	514-4785

Areas of Expertise

Banking Agencies	Ted Hirt	514-4785
Banking Issues (Financial Institutions Reform, Recovery and Enforcement Act)	Robin Ball Jerome Epstein	514-4792 514-3338
Establishment Clause Issues	Ted Hirt Tom Millet Charles Sorenson	514-4785 514-3403 514-4020
Farm Credit Administration	Ted Hirt Dave Souders	514-4785 514-2791
Independent Litigating Authority of Federal Agencies	Ted Hirt	514-4785

AREA 10: EMPLOYMENT DISCRIMINATION LITIGATION

Director		Assistant Director	
Brook Hedge	514-3501	Anne M. Gulyassy	514-3527

Areas of Expertise

AIDS and HIV Infection-Related Issues	John Tyler	514-2356
Civil Rights Act of 1964 -- Title VII	Felix Baxter	514-1269
Rehabilitation Act:		
-- Section 502	Kathleen Devine	514-4263
-- Section 504	Ray Larizza	514-4770
	Scott Simpson	514-3495

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OFFICE OF CONSUMER LITIGATION

Deputy Assistant Attorney General		Assistant Directors	
Leslie H. Southwick	514-5421	Margaret A. Cotter	307-0134
		Lawrence G. McDade	307-0138
Director			
John R. Fleder	514-6786	**Senior Litigation Counsel**	
		Eugene Thirolf	307-0066

Areas of Expertise

Agency Action Challenges	Gerald C. Kell	307-0047
Automobile Information Disclosure Act (price labels and new cars)	Lawrence G. McDade	307-0138
Cigarette Labeling and Advertising Matters	Margaret A. Cotter	307-0134
Criminal Prosecution under the Federal Food, Drug, & Cosmetic Act	John R. Fleder Lawrence G. McDade	514-6786 307-0138
Criminal Steroids Matters	Eugene Thirolf	307-0066
Economic Adulteration Cases	Lawrence G. McDade	307-0138
Equal Credit Opportunity Act	Gerald C. Kell	307-0047
Fair Credit Reporting Act	Gerald C. Kell	307-0047
Federal Trade Commission Cases	Margaret A. Cotter	307-0134
Food, Drug, and Cosmetic Act -- Civil Cases	Jacqueline H. Eagle Gerald C. Kell	307-0052 307-0047
Grand Jury Practice	John R. Fleder	514-6786
Health Fraud Cases	Lawrence G. McDade	307-0138
Odometer Fraud Cases	Don O. Burley Lawrence G. McDade	307-0050 307-0138
Search and Seizure Issues	Lawrence G. McDade	307-0138
Steroids (See Criminal Steroids Matters)		
Truth in Lending Act	Gerald C. Kell	307-0047
Warrants	Lawrence G. McDade	307-0138

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OFFICE OF IMMIGRATION LITIGATION

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Robert L. Bombaugh 501-7030

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Thomas W. Hussey 501-7364

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Robert Kendall, Jr. 501-6397
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Mark C. Walters 501-7364

Case Locator
Pat Brock 501-6389

Areas of Expertise

Administrative Procedure	Robert L. Bombaugh	501-7030
	Lauri Steven Filppu	501-6705
Asylum	Allen W. Hausman	501-7361
Constitutional Law	Robert L. Bombaugh	501-7030
Criminal Law	Richard M. Evans	501-6702
	Robert Kendall, Jr.	501-6397
	David J. Kline	501-6841
Detention and Conditions of Confinement	Allen W. Hausman	501-7361
Detention and Parole	Lauri Steven Filppu	501-6705
Employer Sanctions	Mark C. Walters	501-7364
Immigration and Naturalization Law and Procedure	Robert L. Bombaugh	501-7030
	Richard M. Evans	501-6702
	Lauri Steven Filppu	501-6705
	Allen W. Hausman	501-7361
	Thomas W. Hussey	501-7364
	Robert Kendall, Jr.	501-6397
	David J. Kline	501-6841
	Mark C. Walters	501-7364
Visas and Passports	Thomas W. Hussey	501-7364

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TORTS BRANCH

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Linda Kirk 501-6622

Directors
Gary W. Allen 501-7050
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J. Patrick Glynn 501-7040
Helene M. Goldberg 501-7020

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ADMIRALTY AND AVIATION LITIGATION

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Warren A. Schneider 8/556-3141

Senior Aviation Counsel
Thomas B. Almy 501-7379
Herbert L. Lyons 501-7360

Attorney-in-Charge, New York Field Office
Janis G. Schulmeisters 8/264-0480

Attorney-in-Charge, San Francisco Field Office
Philip A. Berns 8/556-3146

Areas of Expertise

Admiralty

Gary W. Allen	501-7050
Philip A. Berns	8/556-3146
David V. Hutchinson	501-6355
Thomas L. Jones	501-6340
Debra J. Kossow	501-8376
Barbara B. O'Malley	501-7080
Warren A. Schneider	8/556-3141
Janis G. Schulmeisters	8/264-0480

Aviation

Gary W. Allen	501-7050
Thomas B. Almy	501-7379
Kathlynn G. Fadely	501-6357
Herbert L. Lyons	501-7360
Barbara B. O'Malley	501-7080

Maritime Bankruptcy	Philip A. Berns	8/556-3146
	David V. Hutchinson	501-6355
	Janis G. Schulmeisters	8/264-0480
	R. Michael Underhill	8/556-3145
Marshals Service	Philip A. Berns	8/556-3146
	David V. Hutchinson	501-6355
	Janis G. Schulmeisters	8/264-0480

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CONSTITUTIONAL AND SPECIALIZED TORTS LITIGATION

Director
Helene M. Goldberg 501-7020

Assistant Directors
Nicki L. Koutsis 501-7038

Deputy Director
John L. Euler 501-7475

Areas of Expertise

Absolute Immunity	Gordon W. Daiger	501-7132
	Joseph R. Sher	501-6337
Bar Disciplinary Matters	Esther Estryn	501-7056
Childhood Vaccine Act	John Euler	501-7475
	Charles Gross	501-7879
Civil Rights Act	Gordon W. Daiger	501-7132
Classified and Other Governmental Privileges	Gordon W. Daiger	501-7132
	Joseph R. Sher	501-6337
Constitutional Causes of Action	Gordon W. Daiger	501-7132
	Mackie Finnerty	501-7530
	Jack Hinton	501-8716
	Joseph R. Sher	501-6337
Constitutional Torts	Nicki L. Koutsis	501-7038
Immigration Damages	Charles Hamilton	501-7332
Law Enforcement	Salvatore C. D'Alessio	501-7133
	Gordon W. Daiger	501-7132
	Jack Hinton	501-8716
	Joseph R. Sher	501-6337

National Security	Gordon W. Daiger	501-7132
	Joseph R. Sher	501-6337
Personal and Jurisdictional Defenses	Paul M. Brown	501-8067
	Salvatore C. D'Alessio	501-7133
	Jack Hinton	501-8716
	Andrea Wenz McCarthy	501-6966
Personnel Litigation	Salvatore C. D'Alessio	501-7133
	Mackie Finnerty	501-7530
Qualified Immunity	Gordon W. Daiger	501-7132
	Joseph R. Sher	501-6337
Regulatory Tort Litigation	Joseph R. Sher	501-6337
Removal	Paul M. Brown	501-8067
	Jack Hinton	501-8716
Representation Conflicts and Problems	Salvatore C. D'Alessio	501-7133
	Esther Estryn	501-7056
	Andrea Wenz McCarthy	501-6966
Representation of Judges	Esther Estryn	501-7056
Representation Process	All attorneys listed	
State Criminal Matters	Jack Hinton	501-8716
Statutory Causes of Actions	Gordon W. Daiger	501-7132
	Mackie Finnerty	501-7530
	Jack Hinton	501-8716
Supremacy Clause	Andrea Wenz McCarthy	501-6966
Westfall Legislation	Salvatore C. D'Alessio	501-7133
	Andrea Wenz McCarthy	501-6966

* * * * *

ENVIRONMENTAL AND OCCUPATIONAL TORTS LITIGATION

Director		Assistant Director	
J. Patrick Glynn	501-7040	David S. Fishback	501-6645
Deputy Director		**Special Litigation Counsel**	
JoAnn J. Bordeaux	501-8647	J. Charles Kruse	501-6059

Areas of Expertise

Admiralty Jurisdiction	David S. Fishback	501-6645
	Steven Talson	501-6668
Asbestos	David S. Fishback	501-6645
	J. Patrick Glynn	501-7040
	J. Charles Kruse	501-6059
	M. Jane Mahoney	501-7655
	William E. Michaels	501-8675
	S. Michael Scadron	501-7659
	Leslie Yu	501-6847
Asbestos -- Seaman's Cases	David Fishback	501-6645
	J. Charles Kruse	501-6059
	Steven Talson	501-6668
Bivens Suits	J. Charles Kruse	501-6059
Chlordane	Judith M. Macaluso	501-7398
Dinitrobenzene (DNB)	JoAnn J. Bordeaux	501-8647
	Pamela M. Johnson	501-6669
	Paul Yanowitch	501-8654
Discretionary Function	John Beling	501-6853
	David S. Fishback	501-6645
	Steven Talson	501-6668
	Leslie Yu	501-6847
Emotional Distress Claims	JoAnn J. Bordeaux	501-8647
	Judith M. Macaluso	501-7398
	William E. Michaels	501-8675
Federal Tort Claims Act (FTCA)	JoAnn J. Bordeaux	501-8647
	David S. Fishback	501-6645
	J. Patrick Glynn	501-7040
	J. Charles Kruse	501-6059

Freon	Janet Katz	501-7656
Government Procurement Specifications	S. Michael Scadron	501-7659
Groundwater Hydrology	JoAnn J. Bordeaux	501-8647
	William E. Michaels	501-8675
	Paul Yanowitch	501-8654
Immunology	Christina E. Steck	501-6854
Implied Contractual Warranties	David S. Fishback	501-6645
	S. Michael Scadron	501-7659
Jet Propulsion Fuel (JP-4)	William E. Michaels	501-8675
LHWCA	David S. Fishback	501-6645
Polychlorinated Biphenyl (PCB)	Judith M. Macaluso	501-7398
Radon	Wendy Weiss	501-6851
	Paul Yanowitch	501-8654
Real Estate Valuation	JoAnn J. Bordeaux	501-8647
Toxic Torts	JoAnn J. Bordeaux	501-8647
	J. Patrick Glynn	501-7040
	J. Charles Kruse	501-6059
	William Michaels	501-8675
	Steve Talson	501-6668
	Leslie Yu	501-6847
Toxicology	Pamela M. Johnson	501-6669
	William E. Michaels	501-8675
	Christina E. Steck	501-6854
	Paul Yanowitch	501-8654
Trichloroethlyane (TCA)	Christina E. Steck	501-6854
Trichloroethlyene (TCE)	Pamela M. Johnson	501-6669
	William E. Michaels	501-8675
	Christina E. Steck	501-6854
Waste Disposal State-of-the-Art	Ellen Edwards	501-6852
	Timothy B. Walthall	501-6666
	Paul Yanowitch	501-8654
Zinc Phosphide	M. Jane Mahoney	501-7655
	Leslie Yu	501-6847

* * * * *

FEDERAL TORT CLAIMS ACT LITIGATION

Director

Jeffrey Axelrad 501-7075

Assistant Directors

Roger D. Einerson 501-6322
Paul F. Figley 501-7877
Phyllis J. Pyles 501-6879

Senior Trial Counsel

Mary M. Leach 501-6892
Jerry A. Madden 501-7893

Areas of Expertise

Acquired Immune Deficiency Syndrome (AIDS)	Patricia Reedy Julie Zatz	501-7932 501-7879
Administrative Claims	Jim G. Touhey	501-6320
Affirmative Tort Litigation	Nancy Friedman	501-6318
Army Issues	Philip Lynch	501-6334
Assault and Battery Issues	Phyllis J. Pyles	501-6879
Bank Torts	Jerry A. Madden Jill Martindell Michael Truscott Colette Winston	501-7893 501-6890 501-7313 501-8368
Contractor Issues	Paul F. Figley Jim Touhey Daniel R. Unumb	501-7877 501-6320 501-8324
Damages	Larry Klinger	501-6886
Discretionary Function Exception	Nancy Friedman Leon B. Taranto Colette Winston	501-6318 501-6311 501-8368
Federal Tort Claims Act (FTCA)	Jeffrey Axelrad	501-7075
Feres Doctrine	Paul F. Figley Phil Lynch	501-7877 501-6334
Judgment Fund Issues	Jeffrey Axelrad	501-7075
Law Enforcement Issues	Marie Louise Hagen	501-6891

Medical Care Recovery Act	Lawrence A. Klinger	501-6886
Medical Malpractice	Roger D. Einerson	501-6322
	Mary M. Leach	501-6892
	Patricia J. Reedy	501-7932
Misrepresentation Exception	Nancy Friedman	501-6318
	Phyllis Pyles	501-6879
Radiation	Paul F. Figley	501-7877
	Rupert M. Mitsch	501-8205
	Leon B. Taranto	501-6311
	Jim G. Touhey	501-6320
Recreational Use Statutes	Lisa Goldfluss	501-6331
Regulatory Torts	Phyllis J. Pyles	501-6879
	Sally M. Rider	501-6312
Structured Settlements	Roger Einerson	501-6322
	Lawrence A. Klinger	501-6886
Toxic Torts	Phyllis J. Pyles	501-6879
	Elizabeth A. Strange	501-8377
Vaccine FTCA Litigation	Gail K. Johnson	501-6889
	Mary M. Leach	501-6892
	Rupert M. Mitsch	501-8205
	Julie Zatz	501-7879

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END

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